

Commonwealth of Massachusetts
ATTORNEY-GENERAL'S REPORT

1920

**EXECUTIVE OFFICE OF
HUMAN SERVICES**

Office of the Secretary
Room 904
100 Cambridge Street
Boston, Massachusetts 02202

The Commonwealth of Massachusetts

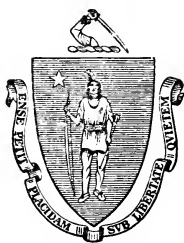
REPORT

OF THE

ATTORNEY-GENERAL

FOR THE

YEAR ENDING JANUARY 19, 1921



BOSTON

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The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY-GENERAL,
BOSTON, Jan. 19, 1921.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the department for the year ending this day.

Very respectfully,

J. WESTON ALLEN,
Attorney-General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY-GENERAL.

State House.

Attorney-General.

J. WESTON ALLEN.

Assistants.

EDWIN H. ABBOT, Jr.

ALEXANDER LINCOLN.

ARTHUR E. SEAGRAVE.

JOHN W. CORCORAN.¹

JAY R. BENTON.

LELAND POWERS.²

ALBERT HURWITZ.

MAYNARD C. TEALL.

CHARLES R. CABOT.

Chief Clerk.

LOUIS H. FREESE.

¹ Resigned April 15, 1920.

² Resigned Sept. 1, 1920.

STATEMENT OF APPROPRIATION AND EXPENDITURES.

Appropriation for 1920,	\$53,000 00
Appropriation, additional,	20,000 00
Appropriation, special,	10,000 00

Expenditures.

For law library,	\$1,001 73
For salaries of assistants,	20,698 14
For clerks,	7,200 00
For office stenographers,	5,702 40
For telephone operator,	794 00
For legal and special services and expenses,	13,916 24
For office expenses,	3,768 90
For court expenses,	1,553 42
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Total expenditures,	\$54,634 83

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY-GENERAL,
BOSTON, Jan. 19, 1921.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my report for the year ending this day.

The cases requiring the attention of this department during the year, to the number of 9,797, are tabulated below:—

Corporate franchise tax cases,	918
Extradition and interstate rendition,	203
Grade crossings, petitions for abolition of,	60
Indictments for murder,	46
Inventories and appraisals,	23
Land Court petitions,	86
Land-damage cases arising from the taking of land by the Department of Public Works,	41
Land-damage cases arising from the taking of land by the Metropolitan District Commission,	29
Land-damage cases arising from the taking of land by the State House Building Commission,	2
Miscellaneous cases arising from the work of the above-named commissions,	18
Miscellaneous cases,	606
Petitions for instructions under inheritance tax laws,	25
Public charitable trusts,	114
Settlement cases for support of persons in State hospitals,	36
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth,	7,590

CAPITAL CASES.

Indictments for murder pending at the date of the last annual report have been disposed of as follows:—

JOHN ARZENTI, indicted in Plymouth County, October, 1919, for the murder of Frank Gentile, at Brockton, on July 17, 1919. He was arraigned Oct. 16, 1919, and pleaded not guilty. W. J. Callahan, Esq., appeared as counsel for the defendant. In February, 1920, the defendant was tried by a jury before Thayer, J. The result was a verdict of guilty of murder in the second degree. The defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Frederick G. Katzmann.

JOSEPH E. BAMFORTH, *alias*, indicted in Essex County, May, 1919, for the murder of Minnie Bamforth and Martha E. Graham, at Haverhill, on Jan. 19, 1919. He was arraigned May 16, 1919, and pleaded not guilty. Essex S. Abbott, Esq., appeared as counsel for the defendant. On Oct. 24, 1919, the defendant was committed to the Danvers State Hospital for observation. On Oct. 7, 1920, he was adjudged to be insane, and was committed to the Bridgewater State Hospital. The case was in charge of District Attorney S. Howard Donnell.

WOJCIECH BIRUSZ, *alias*, indicted in Essex County, January, 1919, for the murder of Mary B. Lavoie, at Salem, on Dec. 12, 1918. He was arraigned Jan. 20, 1919, and pleaded not guilty. William H. McSweeney, Esq., appeared as counsel for the defendant. In April, 1920, the defendant was tried by a jury before Callahan, J. The result was a verdict of guilty of murder in the second degree, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney S. Howard Donnell.

NUNZIO COLELLA, indicted in Suffolk County, July, 1919, for the murder of Antonio DeAngelis, on June 8, 1919. He

was arraigned July 16, 1919, and pleaded not guilty. Thomas J. Grady, Esq., appeared as counsel for the defendant. On July 16, 1919, an entry of *nolle prosequi* was made against said indictment except as to so much thereof as charged manslaughter; and on Jan. 15, 1920, an entry of *nolle prosequi* was made against the remainder of said indictment. The case was in charge of District Attorney Joseph C. Pelletier.

JOSEPH CORDIA, *alias*, and FRANCISCO FECI, *alias*, indicted in Middlesex County, November, 1918, for the murder of Louis Fred Soulia, at Billerica, on Oct. 31, 1918. The defendants were arraigned Nov. 19, 1918, and pleaded not guilty. Daniel J. Donahue, Esq., and Melvin G. Rogers, Esq., appeared as counsel for Joseph Cordia, and Meyer J. Sawyer, Esq., and John H. Mack, Esq., for Francisco Feci. In March, 1919, the defendants were tried by a jury before Dubuque, J. The result was a verdict of not guilty in the case of the defendant Joseph Cordia, and a verdict of guilty of murder in the first degree in the case of the defendant Francisco Feci. The motion of the defendant Francisco Feci for a new trial was denied, and his exceptions were overruled by the Supreme Judicial Court. The defendant was thereupon sentenced to death by electrocution during the week beginning Aug. 15, 1920, which sentence was carried out on Aug. 16, 1920. The case was in charge of District Attorney Nathan A. Tufts.

JOSEPH DELAURENTIS, indicted in Suffolk County, December, 1919, for the murder of William L. Duchaine, on Nov. 11, 1919. He was arraigned Dec. 10, 1919, and pleaded not guilty. Richard M. Walsh, Esq., appeared as counsel for the defendant. In March, 1920, the defendant was tried by a jury before John F. Brown, J. The result was a disagreement by the jury, and an entry of *nolle prosequi* was made against said indictment. The case was in charge of District Attorney Joseph C. Pelletier.

ANGELO DICASSIO, *alias*, indicted in Hampden County, December, 1919, for the murder of Volpini Fillippo at Spring-

field, on Nov. 30, 1919. He was arraigned Dec. 30, 1919, and pleaded not guilty. Silvio Martinelli, Esq., and Thomas F. Moriarty, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than fifteen nor less than twelve years. The case was in charge of District Attorney Charles H. Wright.

IMBRIAN HASSAN and SULEMAN HASSAN, indicted in Essex County, January, 1919, for the murder of Ali Hassan, at Salem, on Oct. 28, 1918. The defendants were arraigned Feb. 6, 1919, and pleaded not guilty. Edward J. Carney, Esq., and Charles A. Green, Esq., appeared as counsel for the defendant Imbrian Hassan, and William H. Fay, Esq., and Thomas R. Vahey, Esq., appeared as counsel for the defendant Suleman Hassan. On July 3, 1919, an entry of *nolle prosequi* was made on so much of the indictment against Suleman Hassan as charged murder in the first degree; and on Oct. 2, 1919, an entry of *nolle prosequi* was made on so much of the indictment against Imbrian Hassan as charged murder in the first degree. In October, 1919, the defendants were tried by a jury before Callahan, J. The result was a verdict of guilty of manslaughter in the case of the defendant Imbrian Hassan, and a verdict of not guilty in the case of the defendant Suleman Hassan. The defendant Imbrian Hassan was thereupon sentenced to State Prison for a term of not more than seven nor less than five years. The exceptions of the defendant Imbrian Hassan were overruled by the Supreme Judicial Court. The case was in charge of District Attorney S. Howard Donnell.

ANTONIO INGEMI, indicted in Essex County, May, 1919, for the murder of Salvatore Salvo, at Salem, on March 21, 1919. He was arraigned May 16, 1919, and pleaded not guilty. Edward J. Carney, Esq., and Charles A. Green, Esq., appeared as counsel for the defendant. On April 20, 1920, the defendant retracted his former plea, and pleaded

guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than eight nor less than six years. The case was in charge of District Attorney S. Howard Donnell.

FRANK WALTER POTTER, indicted in Hampden County, May, 1919, for the murder of George A. Bills, at Palmer, on Feb. 24, 1919. He was arraigned May 16, 1919, and pleaded not guilty. Richard P. Stapleton, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Charles H. Wright.

HENRY SEIPEL, indicted in Plymouth County, October, 1919, for the murder of Alfred W. Raymond, at Brockton, on July 1, 1919. A. F. Barker, Esq., appeared as counsel for the defendant. On Oct. 21, 1919, the defendant was committed to the State Farm for observation. On Feb. 19, 1920, a verdict of not guilty by reason of insanity was ordered by Thayer, J. The defendant was thereupon committed to the Bridgewater State Hospital for life. The case was in charge of District Attorney Frederick G. Katzmam.

ANTONIO TEREGNO and MARIA CAMMEROTA, indicted in Hampden County, March, 1918, for the murder of Raffæle Cammerota, at Westfield, on Jan. 30, 1918. The defendants were arraigned March 22, 1918, and pleaded not guilty. Frank M. Zottoli, Esq., and Silvio Martinelli, Esq., appeared as counsel for Antonio Teregno, and Frank P. Fralli, Esq., for Maria Cammerota. In September, 1918, the defendants were tried by a jury before Nelson P. Brown, J. The result was a verdict of guilty of murder in the first degree in the case of Antonio Teregno, and a verdict of guilty of manslaughter in the case of Maria Cammerota. The defendant Maria Cammerota was thereupon sentenced to the Reforma-

tory for Women for a term of fifteen years. In the case of the defendant Teregno exceptions were taken at the trial of the case, which exceptions were overruled. The defendant Antonio Teregno was thereupon sentenced to death by electrocution during the week beginning April 4, 1920. On April 9, 1920, the defendant's motion for a new trial was allowed, and execution of the sentence upon him was stayed. On May 17, 1920, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Charles H. Wright.

DOMENICK VASS and MANUEL SMITH, indicted in Suffolk County, June, 1919, for the murder of Francis Marshall, on April 25, 1919. The defendants were arraigned June 11, 1919, and each pleaded not guilty. William H. Lewis, Esq., appeared as counsel for the defendant Domenick Vass, and J. W. Schenck, Esq., appeared for the defendant Manuel Smith. In January, 1920, the defendants were tried by a jury before Aiken, C.J. The result was a verdict of not guilty, directed by the court, in the case of Domenick Vass, and a verdict of guilty of manslaughter in the case of Manuel Smith. The defendant Manuel Smith was thereupon sentenced to jail for two years. The cases were in charge of District Attorney Joseph C. Pelletier.

JENNIE G. ZIMMERMAN, indicted in Hampden County, September, 1919, for the murder of Henry Zimmerman, at Springfield, on Aug. 7, 1919. She was arraigned Sept. 15, 1919, and pleaded not guilty. William G. McKechnie, Esq., and Thomas J. Collins, Esq., appeared as counsel for the defendant. In May, 1920, the defendant was tried by a jury before Nelson P. Brown, J. The result was a verdict of not guilty by reason of insanity. The defendant was thereupon committed to the Northampton State Hospital. The case was in charge of District Attorney Charles H. Wright.

Indictments for murder found since the date of the last annual report have been disposed of as follows:—

GASPARE ASOLD, JOHN CAMMERARA, FRANK FIGUCCIA and TONY PIZZO, indicted in Middlesex County, January, 1920, for the murder of Tony Carchidi, at Woburn, on Jan. 4, 1920. The defendants were tried on so much of said indictments as charged assault with intent to murder, and so much of said indictments as charged murder in the first degree was placed on file. The cases were in charge of District Attorney Nathan A. Tufts.

GIUSEPPE BONANNO, indicted in Middlesex County, November, 1920, for the murder of Francesco Bonanno, at Cambridge, on Nov. 3, 1920. He was arraigned Nov. 8, 1920, and pleaded not guilty. Jerome J. Russo, Esq., appeared as counsel for the defendant. In January, 1921, the defendant was tried by a jury before Cox, J. The result was a verdict of guilty of murder in the second degree, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Nathan A. Tufts.

GIUSEPPE BOTTA, indicted in Norfolk County, April, 1920, for the murder of Concetta Botta, at Franklin, on Feb. 29, 1920. He was arraigned May 3, 1920, and pleaded not guilty. Henry E. Ruggles, Esq., and J. J. McAnarney, Esq., appeared as counsel for the defendant. In November, 1920, the defendant was tried by a jury before Thayer, J. The result was a verdict of guilty of manslaughter. The defendant was thereupon sentenced to State Prison for a term of not more than twelve nor less than nine years. The case was in charge of District Attorney Frederick G. Katzmann.

GENERO BUONICONTA, indicted in Hampden County, May, 1920, for the murder of Dominic Richy, at Springfield, on April 11, 1920. The defendant was arraigned May 14, 1920, and pleaded not guilty. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea

was accepted by the Commonwealth, and the defendant was thereupon sentenced to the house of correction for two years and six months. The case was in charge of District Attorney Charles H. Wright.

NICHOLAS CARUSO, indicted in Middlesex County, June, 1920, for the murder of John C. Cunniff, at Newton, on May 25, 1920. He was arraigned June 11, 1920, and pleaded not guilty. James S. Cannon, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Nathan A. Tufts.

PASQUALE CATRAMBONE, indicted in Plymouth County, February, 1920, for the murder of J. B. George Guyette, at Brockton, on Nov. 29, 1919. He was arraigned Feb. 19, 1920, and pleaded not guilty. John J. Geogan, Esq., and Francis J. Geogan, Esq., appeared as counsel for the defendant. On Aug. 16, 1920, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Frederick G. Katzmann.

GAETANO DI DOMENICO, *alias*, indicted in Middlesex County, March, 1920, for the murder of Giuseppe Ugliotti, at Somerville, on Sept. 9, 1919. He was arraigned April 27, 1920, and pleaded not guilty. William H. Lewis, Esq., and Isidore H. Fox, Esq., appeared as counsel for the defendant. On June 7, 1920, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than ten nor less than eight years. The case was in charge of District Attorney Nathan A. Tufts.

NICOLA DISPENSA, indicted in Essex County, May, 1920, for the murder of Guisepppe Polizatta, at Lawrence, on Feb. 14, 1920. On Oct. 19, 1920, the defendant was adjudged to be insane, and was committed to the Bridgewater State Hospital. The case was in charge of District Attorney S. Howard Donnell.

HENRY A. FRAZIER, indicted in Suffolk County, January, 1920, for the murder of Rufus Oxley Williams, on Dec. 12, 1919. He was arraigned Jan. 22, 1920, and pleaded not guilty. The defendant later retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than ten nor less than seven years. The case was in charge of District Attorney Joseph C. Pelletier.

JOHN GRACO, indicted in Suffolk County, July, 1920, for the murder of Frank Pierro, on June 18, 1920. Thomas J. Grady, Esq., appeared as counsel for the defendant. On Sept. 20, 1920, the defendant was arraigned, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than seven nor less than four years. The case was in charge of District Attorney Joseph C. Pelletier.

MARY LEVESQUE, indicted in Essex County, May, 1920, for the murder of a male child, at Lawrence, on Jan. 29, 1920. She was arraigned May 19, 1920, and pleaded not guilty. On June 22, 1920, the defendant retracted her former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to the House of Correction for a term of one year. The case was in charge of District Attorney S. Howard Donnell.

EUPLIO NUZZO, indicted in Middlesex County, March, 1920, for the murder of Angelo Quercues, at Malden, on

March 14, 1920. He was arraigned May 4, 1920, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than twelve nor less than ten years. The case was in charge of District Attorney Nathan A. Tufts.

JOSEPH SAMMARCO, indicted in Suffolk County, January, 1920, for the murder of William G. Clancy, on Jan. 22, 1920. Thomas J. Grady, Esq., appeared as counsel for the defendant. In March, 1920, the defendant was tried by a jury before John F. Brown, J. The result was a verdict of guilty of murder in the second degree, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Joseph C. Pelletier.

ANNA TOMASZKEWICZ, indicted in Hampshire County, February, 1920, for the murder of Andrew Tomaszkewicz, at South Hadley, on Aug. 11, 1919. She was arraigned Feb. 24, 1920, and pleaded not guilty. Edward J. Stapleton, Esq., and Richard P. Stapleton, Esq., appeared as counsel for the defendant. In May, 1920, the defendant was tried by a jury before Thayer, J. The result was a verdict of not guilty, by reason of insanity. The defendant was thereupon committed to the Northampton State Hospital. The case was in charge of District Attorney Thomas J. Hammond.

HAROLD VANDERCAR, indicted in Worcester County, August, 1920, for the murder of Charles A. Thomas, at Leominster, on July 31, 1920. He was arraigned Sept. 7, 1920, and pleaded not guilty. Thomas L. Walsh, Esq., appeared as counsel for the defendant. On Nov. 10, 1920, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Edward T. Esty.

The following indictments for murder are now pending:—

JOSEPH BALZARANO, indicted in Berkshire County, January, 1916, for the murder of Vincenzo Cresci, at Dalton, on March 27, 1915. He was arraigned Jan. 15, 1918, and pleaded not guilty. Thomas F. Cassidy, Esq., and Joseph W. Lewis, Esq., appeared as counsel for the defendant. In July, 1920, the defendant was tried by a jury before Callahan, J. The result was a verdict of guilty of murder in the second degree, and the defendant was thereupon sentenced to State Prison for life. The defendant's motion for a new trial was denied, and his exceptions taken at the trial of the case are pending. The case is in charge of District Attorney Charles H. Wright.

JOHN T. FISHER, indicted in Hampden County, December, 1920, for the murder of Lillian Fisher, at Springfield, on Oct. 14, 1920. He was arraigned Dec. 31, 1920, and pleaded not guilty. Harry M. Ehrlich, Esq., and Isidore H. Hurowitz, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Charles H. Wright.

ANTONIO GREGORE, indicted in Hampden County, December, 1920, for the murder of Antonio Gonsalves, at Ludlow, on Nov. 30, 1920. He was arraigned Dec. 31, 1920, and pleaded not guilty. James E. Dunleavy, Esq., and Francis I. Gallagher, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Charles H. Wright.

BRUNO MAZZATTO, indicted in Berkshire County, January, 1920, for the murder of Vincenzo Desteto, at Pittsfield, on Aug. 13, 1919. He was arraigned Jan. 21, 1920, and pleaded not guilty. Thomas F. Cassidy, Esq., and Patrick J. Moore, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Charles H. Wright.

CHARLES MILLER, indicted in Hampden County, December, 1920, for the murder of Lillian Miller, at Springfield, on Nov. 25, 1920, and for the murder of Grace H. Dickerson, at Springfield, on Nov. 29, 1920. He was arraigned Dec. 31, 1920, and pleaded not guilty. Thomas F. McGlynn, Esq., and Louis C. Gaines, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Charles H. Wright.

GEORGE L. ROLLINS, *alias*, indicted in Suffolk County, March, 1917, for the murder of Ordway R. Hall, at Boston, on Feb. 21, 1917. He was arraigned April 20, 1917, and pleaded not guilty. Herbert L. Baker, Esq., and Thomas L. Walsh, Esq., appeared as counsel for the defendant. On June 3, 1918, the defendant was tried by a jury before Keating, J. The result was a verdict of guilty of murder in the first degree. Exceptions were filed which are now pending. The case is in charge of District Attorney Joseph C. Pelletier.

NICOLA SACCO and BARTOLOMES VANZETTI, indicted in Norfolk County, September, 1920, for the murder of Alexander Barardelli and Frederick A. Parmenter, at Braintree, on April 15, 1920. The defendants were arraigned Sept. 28, 1920, and pleaded not guilty. Fred H. Moore, Esq., and William J. Callahan, Esq., appeared as counsel for the defendants. No further action has been taken in these cases. The cases are in charge of District Attorney Frederick G. Katzmann.

ROCCO SCICCHITANI, indicted in Middlesex County, November, 1920, for the murder of Thomas J. Riley, at Cambridge, on Nov. 21, 1920. He was arraigned Nov. 30, 1920, and pleaded not guilty. No further action has been taken in this case. The case is in charge of District Attorney Nathan A. Tufts.

PHILIP M. TAYLOR, indicted in Hampden County, May, 1920, for the murder of Virginia Walker, at Springfield, on Feb. 20, 1920. The defendant has been committed to the Northampton State Hospital for observation. The case is in charge of District Attorney Charles H. Wright.

PUBLICATION OF THE OPINIONS OF THE ATTORNEYS-GENERAL.

I recommend that a sufficient sum of money be appropriated for the purpose of continuing the publication of the opinions of the Attorneys-General, there now being, in my judgment, a sufficient number of public interest to make a volume of the size heretofore published.

SERVICE OF CIVIL PROCESS UPON CORPORATIONS.

I renew the recommendations contained in the two last annual reports of the Department for amendments to the law concerning the service of civil process upon corporations.

I recommend that the General Laws, chapter 223, section 37, be amended by including the president and treasurer in the list of officers upon whom service may in any event be made, and that the State police officers be empowered by law to serve processes issued by the court, upon informations filed by the Attorney-General, against corporations for failure to file returns required by statute. As the law now stands service upon an officer of the corporation is required to be made by a deputy sheriff. If the State police officers are permitted to perform this service it will result in a substantial saving to the Commonwealth.

PRACTICE OF SPECIAL JUSTICES AND POLICE COMMISSIONERS
IN CRIMINAL CASES WITHIN THE JURISDICTION OF THEIR
OFFICES.

The Attorney-General has been informed that in certain instances a special justice of a police or district court has acted as counsel for defendants in the trial of criminal cases before the court in which he holds the office of special justice, and that in some instances an attorney-at-law holding the office of police commissioner has acted as counsel for defendants in criminal cases. I am of the opinion that there is grave impropriety in such a practice, and that appropriate legislation should be enacted to prohibit the special justice of any court from being retained or employed as attorney in any criminal proceeding pending in his court, and that a

police commissioner, or other official performing the same or similar duties, should be prohibited from being retained or employed as attorney in any criminal proceeding in any court within the jurisdiction of his office.

PERMITS TO BE AT LIBERTY, PAROLE AND DISCHARGE.

The statutes relating to permits to be at liberty, parole and discharge of persons convicted of crime are contained in sections 128 to 151 of chapter 127 of the General Laws.

Section 133, which deals with permits to be at liberty from State Prison, provides that "if the prisoner is held in the prison upon two or more sentences, he shall be entitled to receive such permit when he has served a term equal to the aggregate of the minimum terms of the several sentences, and he shall be subject to all the provisions of this section until the expiration of a term equal to the aggregate of the maximum terms of said sentences."

Except for the language of section 133, just quoted, the statutes make no express provision for those cases where prisoners have been convicted and sentenced to imprisonment for two or more offences. In consequence, considerable confusion has arisen where persons are confined upon two or more sentences in any of the prisons except the State Prison, including the Massachusetts Reformatory, the Reformatory for Women, the Prison Camp and Hospital, the State Farm, and in jails, workhouses and houses of correction. The first question which arises is whether a prisoner who has had two or more sentences imposed upon him may be conditionally released from confinement under any sentence except the last. If he may be conditionally released from confinement under the first sentence, may he be required, immediately upon such release, to begin serving his second sentence? If the latter question be answered affirmatively, and the second sentence be served in full, does any portion of the time prescribed in the first sentence remain unexpired? If he may be conditionally released from confinement under the first sentence, and if he may not be required immediately to begin serving his second sentence, upon the theory that the second sentence, by its terms, is to

begin "from and after the expiration of" the first, what is the effect upon the mittimus issued pursuant to the second sentence? Section 8 of chapter 279 of the General Laws, relative to the order in which sentences shall be served, is not of assistance in answering these questions.

In view of the fact that the opinions of the officials in the Department of Correction and in several State and county penal institutions differ upon these questions, that the custom which has prevailed appears to be at variance with the literal construction of the law, and that the intent of the Legislature is not clear upon a careful reading of the statutes, I recommend that legislation be enacted to remove the uncertainty.

EXECUTION OF LEASES IN BEHALF OF THE COMMONWEALTH.

There is no general statutory authority conferred upon any official to execute leases in behalf of the Commonwealth. Departments, commissions and boards are frequently required to occupy quarters outside the State House, and in some instances in cities and towns in different parts of the State. The question how leases in such cases should be executed cannot be answered authoritatively. I recommend the passage of an act authorizing the execution of such leases by heads of departments, with the approval of the Governor and Council.

DIVIDENDS AND INTEREST ON DEPOSITS IN THE SAVINGS DEPARTMENT OF TRUST COMPANIES.

G. L., c. 167, § 17, provides, in part, as follows: —

Dividends or interest on deposits in the savings department of trust companies or in savings banks may be declared and paid for periods of not less than one month or more than six months, as determined by their by-laws, from income which has been earned and collected during the next preceding six months but such dividends or interest, whenever paid, shall not exceed the average monthly income of the preceding six months' period. . . .

A literal construction of this provision would require that dividends or interest on deposits in the savings department

of a trust company should not exceed the average monthly income, even although such dividends or interest were declared and paid for periods of three or six months instead of one month. This, evidently, was not the intention of the Legislature.

I recommend that the section be amended by striking out the words "whenever paid, shall not exceed the average monthly income of the preceding six months' period," and inserting in place thereof the words "if paid for a period of less than six months, shall not exceed the proportionate amount, for the dividend period, of the income for the preceding six months."

PENALTIES FOR ILLEGAL ACTS BY BANK OFFICIALS.

The work of this Department was greatly increased when the Commissioner of Banks closed four trust companies and two private banks during the interval between Aug. 11, 1920, and Sept. 28, 1920. Since that date other private banks have been closed. The closing of these banking houses, although precipitated by the operations of Ponzi in the case of the Hanover Trust Company, and by the abnormal business conditions in the case of all of them, was an inevitable result of unsound banking methods and unwise and speculative investments continued during a period of years. The sudden termination of the business of these institutions as going concerns raised many important legal questions, involving bad loans, operations in foreign exchange and lax business methods, both in the commercial and savings departments of certain institutions. In this legal work the Department of the Attorney-General has had the services of Hon. Henry A. Wyman, who, at the Attorney-General's request and with the approval of His Excellency Governor Coolidge, has rendered valuable assistance to the Department, on the condition imposed by Mr. Wyman that his services should be without compensation. Acting in an advisory capacity to Commissioner Allen, he has given a large share of his time to the Commonwealth, until, on account of illness, he was recently obliged to desist. His former service as Attorney-General made him familiar with many of the problems pre-

sented, and the additional expense for legal services, which the closing of these banking institutions would have entailed upon this Department, has been in large part saved to the Commonwealth by his public-spirited service.

That further legislation is needed to curb unsafe banking methods and improvident investments in the future is fully appreciated by the public and by those who are more closely identified with banking business, and realize the extent of the unsafe practices which have brought disaster upon these institutions and great hardship to the thousands of depositors. Remedial legislation is presented for the consideration of the General Court in the report of the Commissioner of Banks and the Commission to investigate the sale of Corporate Securities and Related Matters.

In addition to the recommendations included in those reports, I recommend that legislation be enacted to establish penalties for violation of those provisions of the banking laws which impose certain duties upon and prohibit certain acts by officers, directors and employees of banking institutions. This recommendation has the approval of the Commissioner of Banks.

THE INVESTIGATION OF AUTOMOBILE THEFTS.

The number of automobile thefts in Massachusetts in recent years has directed the attention of the public to the failure of the prosecuting officers to check the evil. It was a significant fact that by far the larger proportion of the thefts was in Suffolk and Middlesex counties. The return of the fugitive Barney to State Prison and the mystery connected with his voluntary offer to surrender himself aroused general suspicion, and the investigation of Commissioner Bates and the representatives of the press showed that the statement given to the public at the time of his apprehension was not correct in important particulars. The public interest which was aroused revived the reports that automobile thieves were operating with receivers of stolen cars in greater Boston, and attention was again drawn to the failure of the authorities to adequately meet the situation.

On Aug. 4, 1920, the Governor and Council ordered that

a sum not exceeding \$8,000 be made available for the use of the Attorney-General in conducting special investigations of the financial transactions of Charles Ponzi and the larceny of motor vehicles.

On the same date the Governor addressed a communication to the Police Commissioner for the City of Boston, as follows: —

AUG. 4, 1920.

HON. EDWIN U. CURTIS, *Police Commissioner for the City of Boston, Pemberton Square, Boston, Mass.*

MY DEAR MR. CURTIS. — Owing to a serious condition in relation to the theft of automobiles in Massachusetts, and the alleged bringing of stolen cars here for sale, I desire that you should take every action in your department to apprehend and bring to punishment the violators of the law. I wish especially that you would co-operate with the Attorney-General in his efforts to co-ordinate the activities of the various district attorneys in the Commonwealth. This is a matter of very grave importance and I cannot make the suggestion any too strong that your department renew and continue your efforts to enforce the law against all its violators.

Very truly yours,

CALVIN COOLIDGE.

Pursuant to the order of the Governor and Council the special investigation of automobile thefts was instituted, with the valuable aid of State police and special officers assigned to the work by Police Commissioner Curtis. Owing to the pressure of public business and the unusual demands upon the Department, due to the Ponzi investigation, on September 25 I engaged the services of Henry F. Hurlburt, Esq., and assigned him to the investigation and prosecution of automobile frauds and related matters. At great personal inconvenience he consented to serve, and on September 29 he was duly appointed a Special Assistant Attorney-General, and his appointment was approved on the same day by the Governor and Council. His former service as district attorney in Essex County, and his familiarity with the conduct of criminal cases have made his service of great value. He has caused cases to be brought to trial which have been long inactive, has instituted proceedings against offenders where prosecutions have been delayed, and has refused to consent

to fines or light sentences, and has secured the imposition of heavy sentences in cases where he believed the defendant was not entitled to clemency.

I submit to you herewith a partial report made by Special Assistant Attorney-General Hurlburt to the Attorney-General, covering his investigation of automobile thefts and related matters to Dec. 31, 1920, setting forth recommendations for legislation and the facts upon which his recommendations are based. The report is annexed to and expressly made a part of this report for the consideration of the General Court.

In the course of his investigation Mr. Hurlburt had occasion to examine into the return of Herman Barney to the State Prison, and has traced the movements of the principals and established the falsity of the report which was given to the public at the time.

THE SURRENDER OF BARNEY.

That portion of Mr. Hurlburt's report which deals with the return of Barney needs little comment. A district attorney, at the request of the fugitive from justice, consented to withholding the true facts about his surrender and the place of his concealment. Commissioner Bates, as the responsible head of the Department of Correction, requested full information of the apprehension of Barney in order that the Commissioner might use such information to obtain, if possible, some clue as to the whereabouts of Manster, the friend of Barney, who had made his escape at the same time and was still at large. He was clearly entitled to the information, but his second letter requesting specific information was not answered. When the information contained in the letter of the district attorney to the Attorney-General, which was at first made "confidential," but afterwards released from any confidence, was received on Oct. 21, 1920, the main facts were already in the possession of Mr. Hurlburt. By the withholding of this information those who had harbored or aided Barney were to that extent protected from detection and prosecution.

The secret negotiation between an officer of the law and

an escaped murderer in the home city of Governor Coolidge, whose name is everywhere associated with the maintenance of law, affords a melancholy commentary on the relations which sometimes exist between public officials and the criminal class. The fugitive felon had not been apprehended, tried or imprisoned within the jurisdiction of Middlesex County. The first duty of the district attorney of that county would appear to be to communicate information of the whereabouts of Barney to the officials of the State Prison, District Attorney Hammond of Northampton, or the chief of the Northampton police.

There was no occasion to treat with Barney for his return. He was within the jurisdiction of the Commonwealth. He should have been taken into custody. The State does not need to bend her head to listen to terms of surrender from an escaped murderer within her own borders. The majesty of the law does not permit it.

THE AUTHORITY OF THE ATTORNEY-GENERAL IN CRIMINAL MATTERS.

The right of the Attorney-General, as the chief law officer of the Commonwealth, to have free access to the courts of the Commonwealth for the prosecution of crime has been denied by the district attorney for the Suffolk District. I am unable to discover that this right has ever before been challenged.

Under date of Dec. 27, 1920, I sent the following communication to the district attorney:—

After conference with Mr. Hurlburt, I beg to advise you that I shall present certain important cases before the grand jury of Suffolk County when it convenes next month. Mr. Hurlburt is of the opinion that the cases will not occupy the time of the grand jury more than ten days or possibly two weeks. As these cases have been prepared by this Department it will not be necessary to call on you for the services of a representative of your office in their presentation.

Under date of Jan. 3, 1921, the district attorney informed me that after careful investigation he had reached the conclusion that the Attorney-General had no right to appear

before the grand jury and present evidence or give advice. Under a later date he informed me that he had expressed this view to the grand jury. Under such instruction from the district attorney, the grand jury would be prejudiced against permitting the presentation of cases by the Attorney-General or his representatives.

As the cases now waiting for presentment to the grand jury have been fully prepared by this Department, Mr. Hurlburt and Mr. Hurwitz, for reasons which to me appear sufficient, are of opinion that the interests of justice will be better served if the cases are presented by the Department. No opportunity was afforded me to present the cases, and after the district attorney had presented such cases as he desired the jury was dismissed.

The district attorney now seeks by new legislation to obtain exclusive control of the courts in his jurisdiction for the prosecution of all criminal cases. On Jan. 15, 1921, he caused to be introduced in the General Court, upon his petition, a bill to change the existing law to provide that the Attorney-General, "upon request of a district attorney," may "assist him by attending the grand jury for the presentation of evidence and appear for the Commonwealth in the trial of criminal cases. He shall not have the right to attend the grand jury for the presentation of evidence or to try criminal cases unless so requested."

By a further amendment he seeks to remove the clause in the present law defining the general duties of district attorneys, which provides that "the attorney-general when present shall have control of such cases;" and also the provision that the Attorney-General and district attorneys "may interchange official duties."

If the proposed legislation had been law during the past year the district attorney for the Suffolk district could have prevented all of the proceedings instituted by the Attorney-General or under his direction against those who were guilty of illegal advertising of silver stocks, against Charles Ponzi for his fraudulent operations, against the Old Colony Foreign Exchange Company, and the proceedings now being prosecuted against dealers in German marks.

In March of last year, when the illegal advertising of silver stocks was continuing unchecked in Suffolk County, and promoters were appealing to the cupidity of the inexperienced investor, the Department of the Attorney-General, to prevent further exploitation, caused to be instituted and prosecuted in the Municipal Court of the City of Boston proceedings against twelve defendants, all of whom either pleaded guilty or were found guilty by the court.

In the following August the State instituted proceedings against Charles Ponzi in the Municipal Court, and his voluntary surrender to the Federal authorities, apparently to avoid prosecution by the State, immediately followed.

In the same month, when District Attorney Kenney of the Southern District and District Attorney Donnell of the Eastern District had taken steps to prevent the operations of the Old Colony Foreign Exchange Company and its agents in their respective jurisdictions, and when no proceedings had been instituted in Suffolk County, where the headquarters of the company were located and the greater part of the business was being transacted, I directed complaints to be brought against the president and others who were active in the management of the business, and arrests were promptly made.

During the current month warrants have been issued by the Municipal Court, in prosecutions directed by the Department of the Attorney-General, to arrest certain persons who have conducted a business in German marks.

In all of these prosecutions the justices of the Municipal Court have not hesitated to exercise the authority vested in them, upon proper cause shown, and the efficient administration of the criminal law in this court has afforded a large measure of protection to the public by its deterrent effect upon those who were engaging in fraudulent operations. The district attorney for the Suffolk District, who has denied the right of the Attorney-General to appear before the grand jury, by his proposed legislation seeks to secure the necessary power to prevent the Municipal Court or any court in his jurisdiction from taking any action at the instance of the

Attorney-General in the apprehension and trial of wrongdoers.

In all of these cases in which the Attorney-General has acted against defendants in Suffolk County the evil consequences of the fraudulent operations have extended far beyond the limits of Suffolk County, and have affected large numbers of people. The Attorney-General is elected by all the people and is the responsible officer charged with the maintenance of law throughout the Commonwealth. When fraud or crime assumes state-wide proportions, no official of a county or district should have the power to prevent action by the State in the protection of its citizens.

It should not be necessary for the Department of the Attorney-General, except in rare instances, to institute or conduct the prosecution of criminal cases. It is only when the local prosecuting officers fail or are unable to cope with crime in their jurisdictions that the duty devolves upon the Attorney-General.

RECOMMENDATIONS WITH RESPECT TO CRIMINAL PROCEDURE.

If the district attorney of the Suffolk District does not succeed in securing legislation which will give him the power to bar the Attorney-General from the courts in criminal cases, and if the Attorney-General is given sufficient authority to enable Special Assistant Attorney-General Hurlburt and the other members of the Department to continue the investigation authorized by the Governor and Council, the prosecution of fraudulent promoters and automobile thieves will be continued until present conditions have been corrected.

I concur in the recommendations made by Special Assistant Attorney-General Hurlburt in his report, and urge upon the General Court the importance of such legislation.

In view of the fact that this Department is prepared to present before the grand jury of Suffolk County important cases which have been prepared by Assistant Attorneys-General Hurlburt and Hurwitz, I urge favorable action at an early date upon that recommendation which would en-

able the Attorney-General to summon a special grand jury and present cases before it when the public interest demands.

The recommendations are as follows: —

(1) District attorneys should be prohibited from nolle prossing or filing cases without first petitioning the presiding justice or the court, setting forth the facts and reasons why the case should be nolle prossed or filed, and then it should not be nolle prossed or filed without a certificate of the presiding justice or the court.

(2) That the Attorney-General should have the power to summon a special grand jury whenever in his opinion the interests of the public demand an investigation of any charges against individuals or corporations; that he should have entire charge of such investigation before such grand jury, both in the presentation and the trial of the cases where indictments might be found.

(3) That all sessions of the grand jury, whether summoned in by district attorneys or by the Attorney-General, should be presided over by a justice of the Superior Court, who would see that only proper evidence was introduced, and instruct the jury properly as to the questions of law involved with reference to the facts produced.

The further recommendation of Mr. Hurlburt that the Attorney-General be authorized to summon witnesses in the investigation of matters which concern the public welfare was urged upon the consideration of the General Court at the last regular session, but was not accorded a hearing. I am convinced that the Attorney-General should be given authority to summon witnesses and require them to testify under oath, subject to the same rights to decline to testify which are given the witness when testifying before the courts, and I direct your attention to the fact that by the laws of New York the Attorney-General of that State has the authority of summoning witnesses, under an act similar to one which was submitted by me and admitted by the Honorable Senate near the close of the last session.

DEPARTMENT OF THE ATTORNEY-GENERAL.

The number of official opinions rendered by the Department during the year, up to Jan. 1, 1921, was 267. The number of cases tried in the Probate Court was 38. Seven cases were tried in the Land Court. The number of cases tried before the Municipal Court of the City of Boston was 28, and 5 cases were tried in other municipal and district courts of the Commonwealth. The number of cases tried in the Superior Court was 40. Ninety-two hearings before a single justice of the Supreme Judicial Court have been attended, and there have been 21 cases argued before the Supreme Judicial Court. One case has been argued before the United States Supreme Court, and 5 cases before the United States Circuit Court of Appeals. In the United States District Court 13 cases have been tried. In addition, the Department has been in attendance at 10 hearings before the Industrial Accident Board, and has conducted an election inquest in Newton.

The collections of the Department for the year amounted to \$302,623.22.

Numerous changes have been made in the personnel of the Department during the year. On April 15, 1920, John W. Corcoran, Esq., resigned from the office of Assistant Attorney-General to enter private practice, after more than six years of efficient service. On Sept. 1, 1920, Leland Powers, Esq., also resigned, in order to give his whole time to the law firm of which he is a member. During his incumbency he had rendered valuable service in matters relating to taxation. On April 10, 1920, Maynard C. Teall, Esq., was appointed an Assistant Attorney-General. On Aug. 7, 1920, Charles R. Cabot, Esq., was appointed an Assistant Attorney-General, and on Nov. 1, 1920, Alexander Lincoln, Esq., was appointed an Assistant Attorney-General. Samuel Spring, Esq., and Peter F. McCarty, Esq., assisted in important work of the Department during July and August. The difficult task which devolved upon the Department of obtaining and compiling information of the number and amount of the unpaid Ponzi claims required the aid of at-

torneys who could speak the Italian language, and the thanks of the Department are due to Vincent Brogna, Esq., Andrew A. Casassa, Esq., and John E. Crowley, Esq., who offered their services without compensation.

Annexed to this report are such of the opinions rendered during the current year as it is thought may be of interest to the public, and a statement of petitions for the abolition of grade crossings pending.

Respectfully submitted,

J. WESTON ALLEN,
Attorney-General.

PARTIAL REPORT OF HENRY F. HURLBURT, ESQ.,
SPECIAL ASSISTANT ATTORNEY-GENERAL, TO
HON. J. WESTON ALLEN, ATTORNEY-GENERAL,
IN RE AUTOMOBILE THEFTS.

Hon. J. WESTON ALLEN, *Attorney-General, Commonwealth of
Massachusetts, State House, Boston, Mass.*

DEAR SIR:—I am herewith submitting to you a partial report of the “automobile cases,” so called, which you designated me to investigate.

About the first of October last I took up the matter, and examined transcripts of docket entries of the counties of Suffolk and Middlesex. In the latter county I found a large number of such cases undisposed of which had been carried on the docket from term to term. Some of these cases showed pleas of guilty, but no sentence; many of them had no plea taken in them; and this does not include cases against certain defendants who had not been apprehended.

In that county I found over 100 cases undisposed of. Some of these indictments were more than two years old and many of them a year old. It seemed to me that some effort should be made to dispose of the cases and clear the docket of them, that guilty parties should be punished, and innocent parties, if any, have the cases against them dismissed.

I found that many defendants had been joined in charges of conspiracy, and then separate indictments were obtained charging these same defendants with the larceny and receiving of stolen automobiles, knowing them to be stolen. This increased the number of cases and gave an appearance of increased business in the criminal court in that county. I also found that some defendants had been indicted for larceny and receiving stolen automobiles in separate indictments instead of joining these charges in one indictment with separate counts, as is usually done in criminal pleadings. Later when I called this matter to the attention of one of the prosecuting officers I was informed that such a method had always been pursued in that county. I consider it a bad practice and not in accord with

the usual way of preparing indictments. While the trial court has the power to order all such indictments against the same defendants to be tried together, the power is discretionary with the presiding justice, whereas if these charges were set forth in one indictment it would not be necessary to invoke that discretion. The pleader of that county who draws the indictments should be instructed to join such cases in one indictment with separate counts. By so doing it would avoid some questions of law of calling upon the discretionary power of the court, and also the thought, in the minds of some, that the present method pursued is for the purpose of making an apparent increase of criminal business in that county and thereby, under the provisions of the Acts of 1918, chapter 272, entitled "An Act relative to salaries of district attorneys and assistant district attorneys," increasing the compensation provided by that act. I believe such an act tends to encourage this method of pleading.

As an illustration of this method I cite one case: Herman L. Barney, now undergoing a sentence for manslaughter in the State Prison for a term of many years, was indicted in that county in twelve separate indictments for larceny of automobiles, and in the second count for receiving the same knowing they were stolen. All of these indictments could have been joined in one indictment with separate counts.

Believing that these cases in that county should be disposed of, application was made to the chief justice of the Superior Court for a special session of the trial court for the transaction of criminal business, which was granted; and, it having been represented to him that a session of three weeks would be adequate to dispose of the list, it was understood that a term of that length should be commenced on Nov. 15, 1920.

Sometime in the summer of 1920, the assistant district attorney of that county was instructed by his superior officer, the district attorney, to take over the investigation of the automobile thefts. Accordingly, he had brought before him parties whom he believed to be implicated in the same. Many appeared before him with counsel and made a clean breast of their participation in the thefts. Their statements were taken stenographically, and while it does not appear that there was any understanding with their counsel that immunity would be granted to these persons, it is fair to assume that there was

such an understanding; otherwise counsel would probably not permit their clients to appear and make a confession.

The result of this action was to recover some stolen automobiles, some of which the officers were able to return to the rightful owners, also some to insurance companies which had paid the loss to the owners of the stolen cars. Certain insurance companies are engaged in the business of writing policies of insurance against thefts, etc., of automobiles, and this amount of insurance is usually written for the full value of the car. It appears from my investigation that certain owners after using their cars so that they deteriorate, or when they for some reason desire to rid themselves of their cars, arrange with a thief or thieves or with others in touch with these thieves to have their cars stolen, and then collect the insurance. Of course in such a case the Commonwealth gets no assistance from the dishonest owner; but this statement must not be taken to apply to all owners who have had their cars stolen and collected their insurance on the same, for some owners have aided the Commonwealth in its effort to punish the thief or thieves. The insurance companies, so far as I have been able to ascertain, do not in any way aid the Commonwealth in apprehending or punishing these thieves and conspirators. If a car is recovered by the police officers and it is one that the insurance company has paid the loss upon, it takes the car as part compensation of its loss and does nothing else.

It is to be regretted that these insurance companies do not co-operate with the public authorities in running down the thieves in such cases, and further by limiting the amount of insurance which they will issue upon cars, or by having a graduated scale of loss to be paid by them according to the age and condition of the car, and thereby to some extent preventing unscrupulous owners of knowingly getting rid of their cars by theft and collecting the full amount they originally paid for the cars.

The cars that are most attractive to be stolen are Fords, Buicks and Hudsons, and in the order named. Rarely is a larger car or a more expensive car stolen. The price usually obtained for such by the thief or thieves is about \$100 for a Ford touring car, \$225 for a Ford sedan, with an increase over this price for other makes. One of the methods of procedure of thieves after stealing cars is to erase the number on the

engine, and with dies or stamps replace another number thereon, or by changing one figure, such as making a "3" into an "8", and then applying for registration under this new number to the Massachusetts Highway Commission and receive a new registration number plate. Some new regulation should be made or method adopted by said Commission by which the history of a car could be traced and thereby make the registration of such stolen cars more difficult.

The persons who steal and sell these cars are usually of the idle class of young men who frequent pool rooms, crap games, etc. The game of stealing cars is easy and brings a handsome return for their efforts. I have always felt that the receivers of these stolen cars, knowing them to have been stolen (and many of them must know they were stolen from the price they pay), should be more severely punished than they are at present. These stolen cars are sold to a certain class of garage keepers, taxi men in the New England States, and some of them are sent to New York and other States, and at the same time cars from New York and other States are sent into this State to purchasers.

The stealing of cars in greater Boston has been enormous. Taken from the records, the number of cars reported stolen in metropolitan Boston is as follows:—

Automobiles stolen in Metropolitan Boston.

	1917.	1918.	1919.
January,	36	25	89
February,	24	40	75
March,	37	61	64
April,	71	74	149
May,	87	76	151
June,	72	69	81
July,	89	49	63
August,	81	66	72
September,	60	80	60 ¹
October,	68	103	—
November,	52	186	—
December,	38	98	—
	715	927	804

¹ September 1 to 24.

Making a total of 2,446 automobiles stolen in two years and nine months, and it is safe to say that a conservative estimate of the value of these cars was not less than \$2,500,000; and when you stop to consider that this only applies to metropolitan Boston, and does not take into account the number of automobiles stolen outside of metropolitan Boston, of which I have no data, you can see at once the great loss that comes to our citizens, some of whom can afford the loss, others of whom cannot, and are put to distress, inconvenience and expense by reason of the larceny. For the year ending Dec. 18, 1920, in Boston alone there have been stolen 508 cars, but owing to the activity of the police 304 of these cars have been recovered.

I have stated the action of the assistant district attorney who took statements from many of the thieves. He did a considerable amount of work in these cases, and by this work secured some stolen automobiles, some of which were returned to the owners, some of which were taken by insurance companies. There are at the present time a number of unclaimed autos so secured which the authorities claim they do not know what to do with. It seems to me that there is sufficient authority in law at the present time to sell such autos, and that, upon petition of the district attorney and order of court after publication to all persons interested, they should be sold at public auction and the proceeds turned in to the State Treasurer's office.

This investigation of the assistant district attorney was a general one, and not particularly applicable to the indictments then pending, except remotely. In order to find out what statements certain thieves made (if it was intended to use any of them as witnesses for the Commonwealth) it was necessary to read through all the statements, some thirty in number (which was done), to find what evidence was applicable to a certain case. By the taking of these statements, while of importance to the general situation, it became a question as to whether the persons who gave them should be sentenced upon indictments either found or to be found against them.

On Thursday, November 11, a special grand jury session was called by the district attorney, at which session I attended as your representative, as Special Assistant Attorney-General. My appearance in that session was not received cordially by the assistant district attorney, who had charge

of the grand jury, but I was permitted by him to remain in the grand jury room with him. He did not think I had a legal right to be present, and subsequently pleas in abatement were filed by the defendants who were indicted at this session alleging that I was unlawfully present, claiming the illegality under the decision in *Commonwealth v. Harris*, 231 Mass. 595. After argument the pleas were overruled, as they should have been, for I understand the law to be that the Attorney-General, being the chief law officer of the Commonwealth, has the right to be present before any grand jury, and introduce evidence and instruct the jury as to the law, regardless of the district attorney and without his approval or permission.

The result of this investigation by the grand jury was that an indictment charging conspiracy against nine defendants was returned, and indictments against some of the same defendants for larceny and receiving stolen automobiles were returned.

The larceny and receiving charge arose out of, and was a part of, the conspiracy indictment, so that instead of one indictment there were ten indictments returned.

It will be borne in mind that the charge of conspiracy is a misdemeanor, while larceny and receiving stolen property, knowing it to be stolen, is a felony. The conspiracy case could involve only imprisonment in the house of correction, whereas the felony could be punished by imprisonment either in the house of correction or in the State Prison.

On Wednesday, November 21, a trial was begun, by the assistant district attorney, of this conspiracy indictment and the felony indictments found by the special sitting of the grand jury on November 11. He considered it necessary to the Commonwealth's case to take pleas of guilty from some of the defendants, with the view of using them as witnesses against one of the defendants named John F. Dillon, a chum of Herman L. Barney mentioned above. After the first witness had testified, James Smith, one of the defendants, pleaded guilty of the misdemeanor charge, and afterwards was used by the assistant district attorney as a witness for the Commonwealth. Dillon pleaded guilty to a charge of receiving a stolen automobile, and was sentenced later.

I did not know what trade was made as an inducement to obtain the plea of Smith at the time it was made, nor did I ever know what trade was made to induce Dillon to plead. The result was that out of these nine defendants only Dillon

was sentenced to the house of correction, and Pohlman was fined \$300, and the case against Quinn was nolle prossed.

I approved of the action in the case against Pohlman and Quinn. I question the judgment of the district attorney in accepting so many pleas from these defendants with the understanding of using them as witnesses. I believe that in all such cases the use of defendants as witnesses for the Commonwealth should be with the approval of the court, and in the event of not using them as witnesses they should be sentenced on their plea of guilty or permitted to retract their plea. I am also satisfied that the filing and nolle prossing of so many cases, and the leniency displayed by the prosecuting officers towards defendants, is detrimental to the successful prevention of the crime of automobile stealing.

It was apparent to me that I was not *persona grata* when I first appeared in Cambridge as your representative, and were it not from a sense of duty I would have withdrawn from the court. As showing that this feeling of antagonism existed, I was not, at the beginning, consulted as to the disposition of cases. I endeavored, however, to avoid friction, and did what I could to co-operate with but not to supersede the assistant district attorney, as he felt the responsibility to be upon himself and not upon me. I addressed the court on the sentencing of Samuel and Irving Fine, two junk dealers charged with receiving a stolen automobile, and upon the sentence of James Harte, an ex-police officer of Boston charged with receiving stolen automobiles. In this last case his counsel claimed he had an understanding with the district attorney that his client should not be sentenced, and I believe it was not the purpose of the district attorney to have this last-named defendant sentenced, and I believe it was only by persistent urgings on my part that he was sentenced. Only toward the close of the special trial session did the assistant district attorney from time to time consult me as to the disposition of cases.

You will notice from the report of the clerk of the Superior Court for the transaction of criminal business, hereto attached,¹ many cases were placed on file, and many nolle prossed. Nearly all these cases were indictments, some of which were nolle prossed for insufficient evidence; some were nolle prossed because the witnesses had pleaded guilty with the understanding, express or implied, that they would be used as government witnesses; others were nolle prossed because they had

¹ Report of clerk of the Superior Court not filed with the Attorney-General's report.

been sentenced on one indictment, or are now undergoing imprisonment, a notable instance being Herman L. Barney above mentioned; and others because of lack of jurisdiction.

In the matter of the filing of cases, some were filed because the party had been sentenced on some indictment; some were filed on pleas of guilty, to be taken from the files in case they failed to conduct themselves properly; some were filed because they had not been apprehended and are to be taken from the files as soon as they are apprehended. I am of opinion that no cases such as these should be filed or nolle prossed without affidavit of the district attorney and certified to by the presiding justice, by a statute on the lines of the provisions of chapter 359 of the Acts of 1885, now repealed.

You will notice in the report of the clerk that all the indictments against Herman L. Barney were nolle prossed. I was consulted about this action and approved the same, as Barney is now undergoing a sentence of many years in the State Prison for the crime of murder, and the docket should be cleared of these cases.

From my experience at Cambridge before the grand jury of that county, and of Suffolk, I feel strongly that unless it is the purpose of the Commonwealth to keep the Attorney-General a mere figurehead without supervision over district attorneys, and subordinate to district attorneys, and without the right to prosecute the cases where in his opinion the interests of the public demand, he should have legislation giving him the right to summons in a special grand jury separate from the grand jury summonsed in by the district attorneys and over which they and their assistants preside. The Attorney-General should have entire charge of presenting such matters as he deems proper for the interest of the people of the Commonwealth, and entire charge of the trial of such indictments as may be found, free from the control or interference of any district attorneys or their assistants.

I have found that the district attorneys of Suffolk and Middlesex resent the assistance of the Attorney-General, and they base their opposition, in part, on the ground that the presence of the Attorney-General or his assistants, either at trials or in the grand jury room, is a reflection upon their integrity. No such purpose, so far as I have been able to ascertain in conference with the Attorney-General, has ever been in his mind or in the minds of his assistants. The pur-

pose of the assistants, acting under instructions of the Attorney-General, is to co-operate fully and completely with the district attorneys.

As a representative of the Attorney-General I had authority to assume charge of the prosecution of the cases, but I did not attempt to exercise that authority except to attempt to insist that adequate sentences should be imposed, and that trades with criminals should not be made to defeat justice in the imposing of sentences. The Attorney-General's assistant should be fully consulted by the district attorney about the disposition of cases where he appears, and the district attorneys and their assistants should show a spirit of co-operation in any cases in which the office of the Attorney-General is represented.

While as a matter of law the Attorney-General or his representative has the right to supersede any district attorney or his assistants in the trial of a case, you have not requested me, and I have not at any time sought, to interfere in the trial of these cases. The district attorneys should understand that the Attorney-General and his designated assistant are there in the interests of the public, and no personal feeling and no desire of personal gratification or credit should influence them to object to the Attorney-General and to his co-operation.

I found in Cambridge this feeling of antagonism to such an extent that at times I felt humiliated, and that it was a reflection upon the Attorney-General's office. I did, however, feel that nothing should be done by me which should in the least way add criticism of any kind to the Attorney-General's office, but my conduct should be based on a spirit of co-operation. For this and other reasons I am firmly of the opinion that legislation should be invoked clearly setting forth the authority to the Attorney-General which I have mentioned. It may be that he will not exercise such authority, but he should have the right to exercise it, because such an exercise by him necessarily would be in the interests of the community and the public.

My investigation of these cases convinces me that there is no organized gang of automobile thieves. That there is a gang engaged in the larceny of automobiles, and in the receiving of stolen automobiles, knowing they were stolen, is clear. These thieves work sometimes alone, and sometimes in pairs, but rarely more than two at a time. As a conspiracy must

involve two or more, I do not believe that some of the indictments charging a conspiracy against a number of these thieves could be maintained if the point was raised that there was no combination or confederation between them to steal automobiles. In one indictment I found fifty defendants named as conspirators. There were a number of cases of conspiracy pending in Middlesex County. The result of charging these defendants with a conspiracy would fail, in my opinion, as against many of the defendants, under the law.

In the course of my investigation of these cases I frequently came in contact with the activities of Herman L. Barney above mentioned, and in the endeavor to find out all facts relating to him and his activities I found a state of affairs relating to his escape from the State Prison and subsequent apprehension which ought to be reported to you for such action as you deem wise to take and as the existing laws permit.

Barney was convicted of manslaughter under an indictment charging him with the murder of a policeman. The murder arose out of his activities in stealing automobiles. He was indicted in Suffolk County, the crime having been committed in Chelsea, in that county. The case was handled by the district attorney's office of that county. Barney was convicted of manslaughter and committed to State Prison at Charlestown, in Suffolk County, on June 28, 1919. On May 26, 1920, he made his escape from that prison, and was returned to the prison on June 30, 1920.

His escape created great interest in the community, and his return to the prison was sensational and was of great interest to the press and public. District Attorney Tufts of Middlesex County took an active part in having him returned, and the question has arisen in the minds of many, why should he be the person who aided in obtaining the return of Barney, the case not having arisen in Middlesex County? I examined certain persons concerning this return, and examined hotel registers at Greenfield and Northampton. Among the persons examined by me were one Stephen Bresnahan of Cambridge, a member of the bar; Edward P. O'Halloran, formerly a lieutenant of the police of the city of Newton; Earl O. Barney, the stepfather of Herman L. Barney; and a chauffeur, Doherty by name. I also caused others to be interviewed, and I report the following facts: —

On Wednesday, June 30, District Attorney Tufts issued a written statement which he gave to the reporters, and which was published in the daily press on Thursday, July 1. I quote from this statement that part which is applicable to this report. The rest of the article is an encomium upon Herman L. Barney of such a character that those who know him as an ordinary thief and cold-blooded murderer might not agree to it.

The portions of the article are as follows: —

Tuesday morning I received a communication from Barney to the effect that he desired to talk with Inspector O'Halloran of Newton and me with reference to his return to State Prison whence he escaped some weeks ago. Arrangements for meeting him were made, and Wednesday morning Inspector O'Halloran and I met him just outside of Brattleboro in the State of Vermont. He expressed a desire to return with us to State Prison, giving as his reason therefor the fact that he was now very much recovered in health which at the time of his escape was badly depleted. Accordingly arrangements were made to return to Massachusetts with him. I notified Elmer Shattuck, warden of the State Prison, that he was in Cambridge with me, and in due course of time he was delivered to the warden of the State Prison. . . .

He left us while he changed his clothes and ate his dinner. He then came out and got into the machine and rode with us to Boston. . . . He made just one request of us, namely, that he be allowed to stop and see his father and mother who live at Arlington before he was taken back to State Prison. That request was granted gladly. . . .

Tuesday morning was June 29. Upon the publication of this information, the Department of Correction being interested in the apprehension of Barney, and having read this statement to the effect that Barney was found in Brattleboro, Vt., took steps to ascertain further details than were contained in that statement, and after diligent inquiry and search by proper officials were unable to find that Barney had ever worked in or had ever been in Brattleboro, Vt., or was in Brattleboro, Vt., at the time of his apprehension. The Commissioner of Correction wrote to Mr. Tufts on July 9, 1920, a letter in which he states: —

Since the former conference between Mr. Bagley, Warden Shattuck and yourself in regard to return of Herman L. Barney, I have been hoping that you would send me an official communication in regard to the matter. It is quite desirable that we should have a complete report setting out the facts relative to the apprehension and return of Barney

for the files of this Department. Will you accordingly be kind enough to send me such report, with as full details as possible concerning the offer of Barney to surrender himself and all the circumstances attending the recovery of the prisoner and his return to State Prison. As Barney was a close friend of Harry W. Manster, who is still at large, the information requested might also be of assistance to this Department in securing the apprehension of Manster.

No reply was received to this letter until July 15, when Mr. Tufts wrote as follows: —

Department of Correction, Boston, Mass.

GENTLEMEN: — Replying to your inquiry of July 9 *in re* return of Herman Barney, I beg to state that I received a communication to the effect that he desired to give himself up and would surrender to Edward O'Halloran and me if we would come after him. This communication came, as I understand it, after he had endeavored to get in touch with District Attorney Pelletier of Boston, learning, however, that the latter was then on the Pacific coast. Mr. O'Halloran and I accordingly went after Barney and brought him back to State Prison. He expressed a desire to see his father and mother, and he was allowed to do so. He seemed entirely willing to return, and expressed himself as determined to do right in the future.

This letter appearing to the Commissioner not to answer his inquiry, the Commissioner again wrote to Mr. Tufts under date of July 21, acknowledging the receipt of Mr. Tufts' letter of July 15, in which, among other things, the Commissioner stated: —

There are several matters of detail, however, which still are not cleared up in connection with this matter. In order to direct your attention to certain phases of the matter which are connected with it from the point of view of this Department, I am asking you the following questions. I should be pleased if you would give me a definite reply to them.

1. Please state the time when you first heard directly from Barney.
2. From what telephone exchange was the message sent?
3. At what telephone exchange was it received?
4. What was the substance of Barney's remarks over the telephone.
5. At what time did you start out to bring back Barney, and who accompanied you?
6. In what town and on what street did you first see Barney?
7. What was his appearance and how was he dressed?
8. Will you please send me a copy for our files of any statement which Barney made to you as to where he had been while at liberty?

Nearly three months having elapsed without a reply, on October 18 the Attorney-General wrote to Mr. Tufts, among other things, as follows: —

On examining the records in the Office of the Commissioner of Corrections there appears to be no report of the apprehension and return of Barney last summer. A detailed report of the facts relative to his apprehension and return should be made to the Department of Correction, and may be of assistance in tracing the movements of Barney or his associates. A copy of a letter to you from Commissioner Bates under date of July 21 is in the files, but so far as it appears it has not been answered. Will you furnish a report covering the matters inquired of in that letter, and any additional information in your possession.

On Oct. 21, 1920, Mr. Tufts replied acknowledging receipt of this letter of the 18th, and stated, among other things: —

I am very glad to give you personally for your information such knowledge as I have of the matter, although it came to me in part in a confidential manner, and I shall ask you to so treat it.

Some five days before the return of Barney I was told by Inspector Edward O'Halloran of the Newton police department, with whom I had previously talked in a general way on several occasions in regard to the possibility of the apprehension of Manster and Barney, that he thought they could be located. . . .

On Monday, June 28, I received word from Mr. O'Halloran that he expected to talk with a party who knew where Barney was. The officer suggested that he, O'Halloran, would like to have me present. I accordingly met Mr. O'Halloran in Greenfield, and went to Northampton with him where we met an attorney who said he represented Barney. He said that Barney wanted to give himself up; that he had advised him so to do, but that he did not want to do so until he, Barney, had talked with his mother. . . . The attorney furthermore said that Barney did not want to surrender until a matter of ten or fifteen days after that date. I told him that although I did not know Mrs. Barney, I would endeavor to get her to see him and that Barney ought to surrender forthwith. I might add that Barney's father was with the attorney at the time.

They left Mr. O'Halloran and me and came back several hours later and said the young man wanted to see his mother forthwith. I accordingly returned to Cambridge, and after attending to my duties at the office got in touch with Mrs. Barney and suggested that she, Mrs. Barney, see her son and urge upon him the advisability of surrendering himself forthwith. That day, Tuesday, if I recall correctly, I received a message which I assume was from Barney, saying he was willing to

surrender, and that his attorney would inform us as to the time and place. I accordingly went to Greenfield that day and met Mr. O'Halloran, and that evening received word to the effect that Barney was willing to surrender to him and to me the next morning. Arrangements were accordingly made to meet him on the road out of Northampton leading to Vermont. There was one condition imposed upon that, and that was that he would not state precisely where he was to surrender. He asked us to say it was near Brattleboro, this in order to relieve the people he had been with from any embarrassment. This we agreed to, for we felt that otherwise he would not surrender.

We met him as arranged for, and he agreed to come back with us. He was dressed in a blue sweater and khaki trousers as I remember them. He said he wanted to change his clothes and say good-bye to the people he was with. We accordingly took him back to Northampton, the place where we met him being out of that city in a northerly direction. Said he would be back in the course of an hour or two. . . .

He did not come back at the time we expected, and we then began to look for him. We circled around in the direction which he went, and asked people in three or four houses if they had seen a young man in that vicinity. At one house we were told by somebody on the piazza that a young man answering his description had gone across the field in the direction from whence we had come. We accordingly swung around to the place where we had started from and found Barney at the place where he said he would be.

My talk with the attorney referred to herein was confidential, and I feel that I am violating my word in giving you all the details that I have.

To this the Attorney-General replied on October 27, acknowledging the above letter and stating, among other things, as follows:—

I assumed upon a hasty reading of your letter that it was intended to serve as a report upon the matters inquired of in my letter to you of October 15, but a more careful reading leaves some doubt in my mind whether you intended the information to be treated as a confidential report for the use of this Department, or as a confidential communication to me personally and not to me as Attorney-General. You state in your letter, "I am very glad to give you personally for your information such knowledge as I have in the matter, although it came to me in part in a confidential manner, and I shall ask you to so treat it."

As Attorney-General of the Commonwealth and its chief law officer, I have a right to request and receive official reports from all district attorneys in the Commonwealth relating to matters in which the Commonwealth is interested, or which I as Attorney-General believe it is for the interests of the Commonwealth to know, and as Attorney-General of the Commonwealth to make such use of such reports as in

the interests of justice I deem wise. . . . If this letter of yours was intended by you to be a confidential communication and not an official report on the subject inquired about, I must inform you that I cannot accept it as such, and my letter to you of October 15 remains unanswered. If it is not to be treated as a confidential communication but as an official report from you as district attorney to me as Attorney-General of the matter inquired of I shall not be bound by any conditions such as are inferred from your letter, and I shall treat it as an official report relating to the Barney case from a district attorney who has some information regarding that case to the Attorney-General. Will you please immediately inform me in writing by the messenger who will deliver you this letter whether your letter of October 21 is an official report from you free from all conditions of a confidential nature, or whether I am to treat it as a purely confidential communication.

To this District Attorney Tufts replied by letter dated October 28, acknowledging receipt of letter of October 27, and stating: —

In re apprehension and return of Herman L. Barney, in which I stated that I desired to have you treat the information which I gave you in that connection as confidential, I beg to state that you are free to use the information in any way in which your conception of duty prompts you.

On May 26 Barney escaped from State Prison. On that night or the following night he went to the house of, and saw, Stephen A. Bresnahan. Bresnahan had never acted as counsel for Barney and was not his counsel. He had become acquainted with Barney prior to his being admitted to the bar by reason of Barney's coming in to consult an attorney in whose office Bresnahan was from time to time preparing for his examinations for admission to the bar.

Between May 26 and June 5 Bresnahan met Barney three or four times at different places in Cambridge. He did not during this time communicate to the police authorities any information that would lead to the apprehension of Barney.

On June 5, 1920, Barney appeared at the house of one Meisse in Northampton. Meisse had been a former school-mate of his, and an acquaintance of his stepfather and mother. He arrived there late at night on a motor cycle with a man called Frank Smith (whose identity has not been established). From that date until his return to State Prison he remained in this house in Northampton. He was not in Brattleboro,

Vt., and the statement given to the press by Mr. Tufts to the effect that he and Inspector O'Halloran met Barney just outside of Brattleboro in the State of Vermont was not true, nor is the statement true which was made by him in that same communication to the press that "arrangements were made to return to Massachusetts with him," for it appears that Barney was never out of the Commonwealth after his escape.

Between June 5 and June 13 he was in correspondence with some parties in Cambridge, one of them being Bresnahan. After June 13, and before the visit to Northampton of Bresnahan and O'Halloran, O'Halloran had communicated with Mr. Tufts concerning the whereabouts of Barney, and had an arrangement with Mr. Tufts that upon his going for Barney he would assume the name of Fleming in any telephone conversations that he might have with Mr. Tufts. In the first statement of O'Halloran with reference to this name he denied that he ever went by the name of Fleming or used the same, or was ever known by the name of Fleming. In a subsequent statement he claimed that he assumed the name of Fleming because that was his mother's name, and that he made the arrangement mentioned of telephoning to Mr. Tufts using that name; that in all his police work prior to this time he had never assumed a fictitious name.

On Saturday, the twenty-sixth day of June, Bresnahan and O'Halloran, in the automobile belonging to the police department of the city of Newton, went to Northampton, O'Halloran getting excused from duty by communicating to his chief that he thought he might be able to locate Manster. He did not inform his chief as to where he was going, nor why he was going, nor that he expected to apprehend Barney.

Arriving at Northampton, according to O'Halloran's statement, Bresnahan left him and reported to him that he could not find the party he wanted, who was Barney. He and O'Halloran then drove to the Hotel Devens in Greenfield, where they stopped and registered as follows:—

P. J. Fleming	(Street)	School	(Number)	19
	(City)	Chicopee	(State)	Mass.
John P. Cower	(Street)	Chicopee	(Number)	
	(City)	Athol	(State)	Mass.

"P. J. Fleming" was O'Halloran, and Bresnahan was "John P. Cower."

On Sunday, the 27th, Bresnahan returned to Boston, leaving O'Halloran at the hotel. On Monday, June 28, in company with the stepfather, he took the late afternoon train at the North Station in Boston and went direct to Northampton, arriving there late at night. They both went directly to the house of Meisse, where Barney was, and had a conversation with him, Barney. They then went to the Hotel Draper at Northampton, and registered as follows: —

J. P. Cower	(City)	Chicopee (State)	Mass.
Frank Rogers		Chicopee	

Bresnahan was "Cower," and the stepfather, "Rogers."

On the same day, Monday the 28th, O'Halloran having communicated with Mr. Tufts, Mr. Tufts went to Greenfield and saw O'Halloran. So that when Mr. Tufts states in his communication to the press, already referred to, that on "Tuesday morning" he received a communication from Barney "to the effect that he desired to talk with Inspector O'Halloran of Newton and me with reference to his return to State Prison," he is mistaken. Mr. Tufts was in Greenfield on Monday night.

After arriving at Greenfield on Monday night, Mr. Tufts, his chauffeur and "Thomas Fleming" went to the Weldon Hotel in Greenfield, and there Mr. Tufts registered in his own handwriting as follows: —

N. A. Tufts,	Winchester, Mass.,	and chauffeur.
Thomas Fleming,	Natick.	

"Fleming" was O'Halloran. Mr. Tufts had left Boston about 3 o'clock in the afternoon, and went direct to the Hotel Devens at Greenfield and picked up O'Halloran, otherwise called Fleming, and drove him to the Hotel Weldon. They were assigned rooms.

About half past 11 in the evening, in company with O'Halloran, *alias* Fleming, he went to Northampton to the Hotel Draper. There they met the stepfather and Bresnahan, both of whom took the car and drove up the street about a mile or so, where they got out and were gone about an hour and a half. They then went back to Hotel Draper at Northampton, picked up O'Halloran and Tufts, and the four drove to Greenfield, arriving at the Weldon Hotel.

On Tuesday, the 29th, Mr. Tufts, Bresnahan and the stepfather came back to Boston by motor car, arriving about 10 o'clock in the morning, leaving O'Halloran in Greenfield. The stepfather and Bresnahan were left at Arlington at the house occupied by the stepfather and his wife. Mr. Tufts was driven to the court house at Cambridge, and he instructed the chauffeur to return at half past 2. At half past 2 the chauffeur returned to the court house and was told by Mr. Tufts to go to Arlington to the same house where he had left the stepfather and Bresnahan in the morning and pick up the stepfather. He did this, and picked up the stepfather and his wife and Bresnahan, and drove them to Greenfield. It was agreed between Mr. Tufts, the stepfather and Bresnahan that Tufts was to go to Greenfield that day, and he did go to Greenfield in his own car. Arriving at Greenfield, he picked up O'Halloran. The purpose, according to the statements, of having Mrs. Barney go on the trip was to endeavor to induce Barney to surrender himself, the suggestion having been made by Mr. Tufts in conference with Bresnahan and O'Halloran, and it appears that on Tuesday, the 29th, Mr. Tufts again registered as follows, in his own handwriting: —

Daniel Doherty, Boston.

N. A. Tufts, Winchester, Mass.

Thomas Fleming, Natick, Mass.

Doherty was the name of the chauffeur who drove the stepfather, the mother and Bresnahan to Greenfield; "Thomas Fleming, Natick, Mass.," was O'Halloran.

After supper the party, consisting of the stepfather, Mrs. Barney, Bresnahan, Tufts and O'Halloran, drove to Northampton under orders from Mr. Tufts. The car was stopped at the railroad station, and Mr. Tufts, Mrs. Barney and O'Halloran got out. Bresnahan and the stepfather drove in the car up the main street to about the same point they had stopped the night before, and got out and were gone possibly an hour and a half. Returning to the car they were then driven back to the railroad station, and met Mr. Tufts and Mr. O'Halloran and Mrs. Barney, who had remained at the railroad station during the absence of Bresnahan and the stepfather. A conference then took place between the parties, and afterwards Mrs. Barney got in. This was about half past 10 o'clock at night. She was then driven in the automobile

with the stepfather and Bresnahan back to the same point where the car had been about an hour before. They all got out of the car except the chauffeur, who waited probably fifteen minutes, when the three came back and got into the car and went down to the railroad station. They again had a conference with Mr. Tufts and Mr. O'Halloran, both of whom got into the car with them, and about half past 12 at night they all drove to Greenfield.

Acting under instructions from Mr. Tufts, the chauffeur returned at half past 4 in the morning, when the stepfather and Mrs. Barney were driven to the house in Arlington, arriving about 7.30.

The conversation carried on between the parties at the railroad station was not overheard by the chauffeur, who did not know they were in Northampton for the purpose of apprehending Barney. At this time all of the other parties did know that Barney was in Northampton. Neither Mr. Tufts nor Mr. O'Halloran nor Mr. Bresnahan took any steps to give any information to any police officer to look out for Barney, or to place any guard at or near the house where Barney was located, for the purpose of preventing his escape.

Northampton is about 20 miles from Greenfield. Going to Greenfield the chauffeur drove up by Worcester and Fitchburg, thence through Gardner, Athol, Orange, Millers Falls and Turners Falls, this being the shortest route to take to get to Greenfield, according to the statement of the chauffeur. They did not go by way of Springfield. Northampton is between Greenfield and Springfield, and north of Springfield.

The statement of O'Halloran, that Bresnahan went in and telephoned to some one when they arrived at Northampton and then got into the car and drove with him, is contradicted by the occupant of the house, who states that Bresnahan was at his house on Saturday night, June 26, and saw Barney, and that there he offered the proposition to Barney in his presence to surrender himself to Mr. Tufts on condition that he would be safely brought back to prison and no bodily harm would come to him; and as a further inducement, that Mr. Tufts expected through the notoriety gained in the affair that his chances of winning the governorship at the coming election (for which he said he was going to be a candidate for the nomination in competition with Mr. Cox) would be bright, that his election would be assured, and that he would then be in a position

to see that Barney was pardoned after serving a matter of three or four years. It was also talked over that in the meantime Barney was to be transferred on account of ill health to Rutland, Mass.

The occupant of the house further states under oath that on the following Monday, June 28, about 9.30 P.M., the stepfather and Bresnahan called at the house; that Bresnahan stated that in their opinion it was a better proposition for Barney to agree to surrender; that they had until midnight to telephone or in some way convey Barney's answer to Mr. Tufts, who, they said, was waiting at his house, or would wait until midnight for that message, they having been sent by him; and that Barney agreed to give his answer Thursday or Friday, not promising, however, anything. As a matter of fact, Mr. Tufts at this time was not at his house, but was in Northampton and Greenfield.

On Wednesday, the 30th, Tufts, Bresnahan and O'Halloran left Greenfield about 7.30 or 8 o'clock in the morning, with the chauffeur, who turned out to be Mr. Tufts' private chauffeur, it being Mr. Tufts' private car, and drove to Northampton. They arrived at Northampton somewhere about 9 or half past 9. They drove on the main street in Northampton, called Elm Street, and stopped a short distance from where O'Halloran and Bresnahan had stopped when they first arrived in Northampton on the 26th. Bresnahan got out of the car and went out of sight of O'Halloran and Mr. Tufts, promising to bring Barney back. While Bresnahan was gone O'Halloran saw Barney coming along the street on the sidewalk. O'Halloran spoke to him and told him that "Steve" was waiting for him at the corner, "Steve" being Bresnahan. Bresnahan came back, and Bresnahan ("Steve") and Barney got into the car with Tufts and O'Halloran. Barney said he wanted to have a talk, and they drove up the main street and he had a talk with Bresnahan and the district attorney. O'Halloran claims he heard only part of the talk, in which Barney said he would be willing to come in, but he wanted more time to come in, giving as the reason he wanted to get his clothes fixed up; that he had not been feeling well and wanted to see a doctor, but he (O'Halloran) does not remember whether he (Barney) gave any other reasons, but he did complain of some abdominal trouble, about being in pain, and said he wanted a chance to change his clothes; that Barney and the district

attorney talked together, but that O'Halloran could not hear what was said; that after this drive and conversation Barney was permitted to get out of the car, promising to come back after he had got a change of clothing; that then the car was turned around, they having left Barney on the sidewalk. This was somewhere about 11 o'clock in the morning.

When Barney left he agreed to be back in twenty minutes; that twenty minutes having elapsed, Bresnahan returned and said that Barney was getting some pressing done and they would have to wait a little longer; they felt that Barney was double-crossing them, and they drove up the side street, and on coming back to the original place they found Barney at the place where he agreed to be on the main street, and thereupon he got into the car and the car was driven back to Greenfield; arriving at Greenfield they stopped and had some lunch in front of the hotel, and they then started for Boston.

O'Halloran further stated that they stopped at Mr. Tufts' office in Waltham, this being somewhere about 8 o'clock, just coming on dusk, and then Mr. Tufts left to go to his home in Winchester, and that he, O'Halloran, brought the man out to headquarters in Newton; that subsequently he brought him direct to Mr. Tufts' office in East Cambridge. The stepfather says that Mr. Tufts, O'Halloran and his son came to his house in the morning; that after being there a short time they left.

The first question that naturally comes to the mind of the average person is, what was the motive of so much secrecy in the apprehension of Barney, the signing of fictitious names upon the registers of hotels, midnight rides, the failure to call any police officer or to give any information to police officers or public authorities as to where Barney could be found? The only reasonable motive suggested by any statement taken by me from any of the parties is given by the occupant of the house, as already stated, that Mr. Tufts expected to be a candidate for the nomination of Governor, and the apprehension of Barney would bring him great notoriety.

It is especially important to keep in mind the fact that Mr. Tufts was not interested in this case as the prosecuting officer. The conviction was in Suffolk County, the escape was in Suffolk, and it would seem as though Mr. Tufts, having this information as to the whereabouts of Barney, as a public official should have communicated that information to some public official, either at the State Prison or Northampton. Also the

question arises as to why Mr. Tufts should undertake to deceive the public by stating that Barney was apprehended in Brattleboro, Vt., which at the time it was given out he knew was not true. Why was it that he was giving the impression to the public that Barney was out of the State, and that he overtook him on the road leading from Brattleboro, which was also untrue? Why was it that when Barney was present with himself and a police officer, and after Barney rode in the car with both of them for some little time, he was permitted to get out of the car and disappear; for after he got out of the car until he afterwards came back to the place of appointment Barney was out of sight of both of these officers. The only answer to this last question in any of the statements taken by me that has even been suggested is that Mr. Tufts trusted Barney. This was in contradiction of the sworn statement made by the occupant of the house, that Barney after coming back to the house sought to make an escape through the back door of the house, and that it was only by the urging of the occupant of the house that Barney was made to keep his appointment. Bresnahan stated that he called at the house for Barney and found he was gone.

The facts before me appear to be that after Barney reached Meisse's house he then went to a neighboring house and stayed there for some little time, and that Bresnahan returned to the car where Mr. Tufts and Mr. O'Halloran were and informed them that he was afraid that Barney would not show up, but that he would make another effort, and his claim is that while he was going one way back to the Meisse house Barney went another way and met Mr. Tufts and O'Halloran.

Why should O'Halloran mislead his chief by stating that if he could get a vacation he thought he could locate Manster? Why did he not communicate to his chief that he was going after Barney? Why did he register under a false name? When he saw Barney standing by his automobile, and when Barney was in his automobile, why as a police officer did he not attempt to apprehend an escaped murderer?

These questions I can find no answer for in the statement of O'Halloran, and it seems to me that O'Halloran, knowing as he did for days before he went to Northampton that Barney was in Northampton, and taking no steps to communicate with either the local or State police or with any police officials so that Barney could be apprehended, was guilty of gross neg-

lect of his duty as a police officer and as a citizen. Barney could have been apprehended by him in either capacity.

O'Halloran was interviewed by me and his statement taken stenographically on October 27. On December 9 he, having had an opportunity to review his statement and to make any corrections that he chose, again came before me. Altogether he spent between four and five hours going over his statement, writing the corrections in his own handwriting, which were subsequently made. O'Halloran declined to sign the statement, even after he had made his corrections, unless he was furnished with a copy of the same. This I declined to furnish him, as it was a part of the investigation of the office of the Attorney-General, and in my view he was not entitled to it. Bresnahan also refused to sign his statement, after he had made his corrections, unless he was furnished with a copy, and stated that he had instructed the stepfather not to sign his statement unless copies were furnished to him. For the same reason I declined to furnish him with copies of his own statement and copies of the stepfather's statement.

O'Halloran was asked if he did not register at the Hotel Devens at Greenfield under a fictitious name, and declined to answer on the ground that by so doing it would tend to incriminate him, under the provisions of the Acts of 1918, chapter 259. At the Hotel Weldon, in Greenfield, Mr. Tufts registered O'Halloran under a fictitious name, and he, as district attorney, must have known at the time of doing so that he was violating the law which he was bound to uphold. Bresnahan and the stepfather also registered under fictitious names.

Why should Bresnahan, being in touch with Barney and knowing that he was in Northampton, get in touch with O'Halloran instead of officers in the city of Cambridge, or the State police, or the prison officials? He undertakes to explain it by saying that O'Halloran was a friend of Barney. Barney in his statement taken by me at the State Prison, stated that he did not know O'Halloran except from meeting him twice at Camp Devens.

So the conclusion seems to me to be irresistible that after Barney's escape from the State Prison he got in touch with Bresnahan, who was not his attorney, and within a few days after his escape went to Northampton, from whence he corresponded with Bresnahan; that Bresnahan, O'Halloran and

Mr. Tufts knew on Saturday, the 26th of June, at least (if not before), that Barney was in Northampton; that no steps were taken by any of these parties that would lead to the apprehension of this escaped murderer; that they believed if there was any glory in apprehending Barney, it should be kept to themselves.

As to Mr. Tufts, it would seem as though his duty to the Commonwealth required him to communicate his information to the proper authorities, and not to act as a policeman. District attorneys have always refuted the intimation that they are policemen, but in this matter Mr. Tufts acted as such. In order to induce an escaped murderer to surrender himself when he had it in his power to cause him to be apprehended, he promised to Barney considerations which he had no right to offer, and which he believed would inure to his own political benefit.

It is not true that Barney consulted any doctor in Northampton, nor is it true that Barney's health was restored by his vacation, for an examination of his physical condition after he was brought back to State Prison shows that he had lost about 5 pounds in weight from what he weighed at the time of his escape, and his condition was not as good.

It seems to me that Mr. Tufts and Mr. O'Halloran were guilty of improper conduct, to say the least, in their respective offices.

In the investigation of these cases I had no power to summon witnesses before me, nor had the Attorney-General such power. The result is that some people whom I desired to interrogate in the matter of automobile thefts and kindred subjects declined to appear. I think this lack of power to summon witnesses is a grave error, and that the Attorney-General should have the power to summon people to appear before him where he is investigating a matter in the interests of the people of the Commonwealth.

There are some matters which should be so investigated for the purpose of ascertaining whether crime has been committed, and should be investigated by the Attorney-General before the evidence is presented to a grand jury.

While my work as Special Assistant Attorney-General has been limited to the investigation of automobile cases and kindred subjects, matters have come to my attention outside of the field of my special investigation which convince me

that this power to summon witnesses for the purpose of ascertaining whether any evidence should be presented to the grand jury should be given to the Attorney-General.

It is no answer to this right on the part of the Attorney-General to summon witnesses to say that it is an inquisitorial or star chamber proceeding, and for that reason objectionable. All investigations necessarily are inquisitorial and star chamber proceedings. If it were not so, much crime would escape detection and punishment.

Therefore I urge that power be granted to the Attorney-General to summon witnesses and to investigate matters which concern the public welfare.

My investigation of all these cases so far as it has progressed convinces me that the following recommendations should be adopted by the Legislature:—

1. District attorneys should be prohibited from nolle prossing or filing cases without first petitioning the presiding justice of the court, setting forth the facts and reasons why the case should be nolle prossed or filed, and then it should not be nolle prossed or filed without a certificate of the presiding justice or the court.

2. That the Attorney-General should have the power to summon a special grand jury whenever in his opinion the interests of the public demand an investigation of any charges against individuals or corporations; that he should have entire charge of such investigation before such grand jury, both in the presentation and the trial of the cases where indictments might be found.

3. That all sessions of the grand jury, whether summoned in by district attorneys or by the Attorney-General, should be presided over by a justice of the Superior Court, who would see that only proper evidence was introduced, and instruct the jury properly as to the questions of law involved with reference to the facts produced.

While I am aware that this last recommendation is an innovation in the practice of law in criminal proceedings in this State, still I believe that it would be in the interest of the public if such a law could be adopted. Grand juries, as you well know, were instituted to protect the weak from the strong, the poor from the rich. As it is now, by reason of the conduct of some district attorneys, grand juries have become instruments of oppression to the people rather than instruments

of protection. An indictment found is oftentimes as injurious to the party indicted as a conviction. An indictment may be found upon insufficient evidence, and to my knowledge has been found upon insufficient proper legal instruction to a grand jury. The person indicted, no matter how innocent he may be, when indicted can be arrested and the widest publicity given to his arrest, and the district attorney has it in his power when he finds that he has not sufficient evidence to convict, or for other reasons, to nolle pros the case without the consent of the court or defendant, or to make a trade, which unfortunately citizens are sometimes willing to do in order to avoid any further publicity and expense. I am strongly of the opinion that if a judge should preside over the deliberations of the grand jury, there would be less miscarriage of justice. The power of district attorneys with reference to the filing and nolle prossing of cases should not be longer continued without the approval of the court stated in writing as above mentioned.

While I believe as a matter of law that the Attorney-General has the right to supersede, if necessary, any district attorney, and to take entire charge of the proceedings in the trial of cases of indictments found by a grand jury under the direction or charge of such district attorney, in order that that matter be finally settled it would be well to have a declaration from the Legislature that that is the law of the land, so that there can be no question about it. At the present time it is apparent to me that the Attorney-General's office is hampered by some district attorneys for the reasons herein stated and other reasons, and that the Attorney-General's powers should be clearly defined so that the district attorneys may know that the Attorney-General is their superior officer, and has the right not only to direct them, but if need be, to supersede them in their functions.

Respectfully submitted,

HENRY F. HURLBURT,
Special Assistant Attorney-General.

Boston, Dec. 31, 1920.

OPINIONS.

Schools — Transportation of Pupils living on Islands — Authority of Department of Education and of Cities and Towns.

Unless some statute requires it, a city or town need not provide transportation to and from school, or board in lieu thereof, for children of school age living upon islands within such city or town which are not provided with schools. R. L., c. 25, § 15, is permissive, not mandatory.

The Department of Education, which under Gen. St. 1919, c. 350, § 56, is the successor of the State Board of Education, is authorized by Gen. St. 1919, c. 292, § 5, if the facts warrant it, to furnish such transportation in all cases where some statute does not place this duty upon the city or town.

Gen. St. 1919, c. 292, § 9, authorizes the Department of Education, in a proper case, to require a town to furnish transportation to and from school to children living upon islands within the town which are not provided with schools.

JAN. 8, 1920.

DR. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You ask when a city or town must provide transportation to and from school, or board in lieu thereof, for children of school age living upon islands within the Commonwealth which are not provided with schools, and when, under Gen. St. 1919, c. 292, § 5, the Department of Education may do so.

In my opinion, only a general or special statute can impose this duty upon a city or town. *Newcomb v. Rockport*, 183 Mass. 74; *Davis v. Chilmark*, 199 Mass. 113. R. L., c. 25, § 15, is permissive only, not obligatory. *Newcomb v. Rockport*, 183 Mass. 74. It would seem, therefore, that the Department of Education, as the successor of the State Board of Education under Gen. St. 1919, c. 350, § 56, is authorized by Gen. St. 1919, c. 292, § 5, if the facts warrant, to furnish such transportation or board in all cases where some statute does not place this duty upon the city or town.

In my opinion, Gen. St. 1919, c. 292, § 9, authorizes the State Board of Education (and so the Department of Educa-

tion as the successor of that Board) to "require the town to furnish transportation" when the circumstances therein defined exist. I see no reason why this section should not apply to children of school age upon islands which are not provided with schools. I note, however, that this section apparently applies to towns alone (exclusive of cities), and that it contains no provision for requiring a town to furnish board in lieu of transportation.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

Automobiles — Registration — Substitution of Motors — Change in Maker's Number.

Where an automobile has been registered, and where the maker's number was affixed to the motor therein, and subsequently another motor is substituted, with the result that the maker's number on the substituted motor would not then correspond with the maker's number on the registration card, there should be issued a new registration card bearing the maker's number appearing upon the substituted motor.

JAN. 13, 1920.

Mr. F. I. BIELER, *Secretary, Division of Highways, Department of Public Works.*

DEAR SIR: — You ask my opinion upon the following facts: A company owns a number of Ford cars of different types which have been registered. You desire to know what should be done relative to registration in case the company places a spare motor in one of the cars now registered.

Gen. St. 1919, c. 294, § 2, provides that the application for the registration of a motor vehicle shall contain, among other things, the number, if any, affixed by the maker. I understand that in Ford automobiles the maker's number is affixed to the motor, so that if the company in question should substitute the spare motor in one of their cars, the maker's number thereon would not then correspond with the maker's number on the registration card. As the maker's number is, perhaps, the most important means of identification, I am of the opinion that when the company places its spare motor in one of its cars now registered, it should inform you of the fact, giving you both the maker's number that appears on the registration card of the car, and also the maker's number that appears on the spare motor, and at the same time return

to you the registration card. Your department should then issue in place thereof a new registration card bearing the maker's number appearing upon the spare motor.

Yours very truly,

HENRY A. WYMAN, *Attorney-General*.

*Electric Company — Producing and Distributing Company —
Substitution for Producing Plant of Contract to purchase
Current — Sale of Plant without Consent of Legislature —
Conditional Sale.*

A producing and distributing electric company may substitute for its producing plant a proper and sufficient contract for the purchase of electricity.

A producing and distributing electric company which substitutes for its producing plant a proper and sufficient contract for the purchase of electricity need not retain such plant in order to guard against a failure of the selling company to furnish electricity according to its contract, if such failure is not reasonably to be anticipated.

If a producing and distributing electric company has substituted for its producing plant a proper and sufficient contract for the purchase of electricity, a sale of such plant without first obtaining the consent of the Legislature does not violate St. 1914, c. 742, § 51.

If sale of such plant be proper, St. 1914, c. 742, § 51, does not forbid a contract of conditional sale which provides that immediate possession shall be given to the purchaser, who is bound to pay the purchase price by instalments during a term of years.

JAN. 13, 1920.

HON. HENRY C. ATTWILL, *Chairman, Department of Public Utilities*.

DEAR SIR: — Under date of Sept. 5, 1919, the Board of Gas and Electric Light Commissioners requested my opinion upon the following matter: —

The Worcester Suburban Electric Company is a corporation duly established under the General Laws, and is an electric company within the definition set forth in section 1 of chapter 742 of the Acts of the year 1914. The management of the company since the spring of 1914 has been in the hands of officers, a majority of whom are identified with A & Co., Inc. Prior to that time a controlling interest was owned by B & C, Inc., who are identified with the New England Power Company (formerly Connecticut River Transmission Company) and its affiliated interests. B & C, Inc., on March 31, 1914, in connection with and as part of the transaction hereinafter described, sold to A & Co., Inc., 5,793 out of the 6,000 shares of stock then outstanding. At the same time, and as a part of the same transaction, the company executed the

following instruments with the Connecticut River Transmission Company: —

1. For the sale of electricity by the transmission company to the electric company, referred to as the contract for primary electricity.

2. For the distribution of electricity by the electric company for the transmission company, referred to as the distribution agreement.

3. For reserving the steam station of the electric company at Uxbridge for the use of the transmission company, referred to as the agreement for reserving steam plant.

4. Lease of said steam station by the electric company to the transmission company.

The transaction in question has never been expressly authorized by the General Court. Is this transaction in violation of the terms of section 51 of chapter 742 of the Acts of the year 1914?

I deemed the matter one requiring very considerable study and examination, and, owing to the advice of the chairman of the Board, Hon. A. R. Weed, that the facts in the case were not such that delay would in anywise affect the situation, and owing to the further fact of the unusual demands upon the Department, I have been unable to reply until this time, and now address the same to you as chairman of the Department of Public Utilities, as the successor of the Board of Gas and Electric Light Commissioners, under Gen. St. 1919, c. 350.

Reduced to its lowest terms, the question raised by these four instruments seems to be: If a producing and distributing electric company replaces its producing plant by a thirty-year contract for the purchase of sufficient current, and thereupon sells such producing plant without obtaining the consent of the Legislature, does it violate St. 1914, c. 742, § 51?

St. 1914, c. 742, § 51, provides: —

A corporation which is subject to the provisions of this act shall not, except as is otherwise expressly provided, transfer its franchise, lease its works or contract with any person, association or corporation to carry on its works, without the authority of the general court.

This statute does not in terms prohibit an electric company from selling its works. An electric company authorized to furnish electricity to the public is charged with a public duty which it must discharge within the limits of its reasonable ability. It may not voluntarily disable itself to perform that duty. The Supreme Judicial Court has held that a sale of its physical property which would so disable it is an

evasion of the act and unlawful without legislative consent, even though the franchise is not transferred. On the other hand, the Supreme Judicial Court has also held that an electric company might make an agreement for division of territory with another electric company, and might lawfully sell that portion of its distributing system which lay within the territory so ceded by it. Taking these two cases together, the legality of a sale of so much of the physical property of an electric company as relates to its producing plant, without legislative consent, appears to depend upon whether it materially impairs the ability of the selling company to discharge its duty to the public.

I find nothing in the act which requires an electric company to produce the current which it sells and distributes to the public. On the contrary, section 1 defines an electric company as follows: —

“Electric company” means a corporation organized under the laws of this commonwealth for the purpose of making . . . and selling, *or distributing and selling*, electricity within this commonwealth, . . .

Moreover, I am informed that many electric companies in this Commonwealth are not producing companies, but instead rely upon contracts for the purchase of current. In my opinion, the terms of the act and this common practice both indicate that an electric company may lawfully rely for the performance of its public duty upon an honest and apparently adequate contract for the purchase of current. As an incident of its public duty it is not required to produce the current which it furnishes to the public, or even to install a plant as an additional safeguard against an unanticipated failure of the selling company to supply current.

If a distributing electric company may lawfully rely upon an honest and apparently adequate contract as a source of supply, I see no reason why a company which has produced its own current may not lawfully substitute an adequate supply contract for such producing plant. The original decision of this question would seem fairly to lie in the corporate discretion of such company. It constitutes, as was said in *Weld v. Gas Commission*, 197 Mass. 556, “a detail of administration which is not in violation of law.” If, however, the supply contract should not prove adequate to enable the company to discharge its public duty, there is ample power in

your Board, under the law, to compel due performance thereof. So long as the company duly and adequately furnishes current to the public, I find nothing in the act which prescribes the means by which that duty shall be performed.

If a distributing company has made an honest and apparently adequate supply contract, so that it no longer requires its producing plant to enable it to discharge its public duty, I find nothing in the act which requires the retention of the plant as protection against an unanticipated failure of the selling company to supply current. But if a distributing company which has made an honest and apparently adequate supply contract is not required to retain its plant, the terms upon which it will dispose of it would seem fairly to lie within its corporate discretion. So far as discharge of its public duty is concerned, it would seem to be immaterial whether the sale is a present sale for cash, or a long-term conditional sale upon payment by instalments. In either case the company is merely disposing of property which it no longer requires to enable it to discharge its public duty.

There is a clear duty devolving upon the officers of the corporation thus selling its producing plant to guard against any failure of the contracting producing company to perform its contract, which should be reasonably anticipated, and also to see that before the termination of the contract the selling company is so circumstanced as to continue its full functions as a public service company. It is not so much a question of law as a question of fact that would govern in this particular.

Apply the foregoing to the question submitted: The Worcester Suburban Electric Company, on March 31, 1914, made a contract with the Connecticut River Transmission Company for the purchase of primary electricity during a period of thirty years. There is no suggestion that this contract has not proved entirely sufficient to enable the electric company to discharge its duty to the public. By reason of this contract the steam plant of the electric company was no longer needed by the electric company as a source of its supply. As a part of the same transaction, the electric company, by the so-called reservation agreement, made a conditional sale of this steam plant to the transmission company, the purchase price to be paid in instalments during

a period of twenty years, and the purchaser being put in immediate possession and control. If under these conditions the electric company might have sold outright for cash and have given immediate possession, I find nothing unlawful in giving such possession pending payment of the purchase price under a contract of conditional sale. In neither case is the ability of the electric company to discharge its public duty injuriously affected. Indeed, since, under paragraph 5 of the reservation (conditional sale) agreement, the electric company may require the transmission company to operate the steam plant (materially improved and enlarged, as I am advised) for its benefit, the electric company, for twenty years at least, has two possible sources of supply instead of one.

Under these circumstances I do not find that the simultaneous execution of the agreement for the purchase of primary electricity and of the contract for the conditional sale of the steam plant (reservation agreement) was a violation of St. 1914, c. 742, § 51, even though the consent of the Legislature was not first obtained. There was no "transfer of its franchise" and no "contract" "to carry on its works," within the meaning of the statute. The company continues to conduct its own business, and is not controlled by outside interests, which, I apprehend, is the real purpose underlying the provisions of the statute. To prohibit a corporation to "carry on its works" by means of the purchase of primary electricity, shown clearly to be advantageous to the company and the public, would, in effect, hamper if not deprive it of the management of its own affairs. Such is not, in my judgment, the natural construction to be given the statute, nor by any fair implication can it be so extended.

The question remains whether the execution on March 31, 1914, of the twenty-year "lease" of the steam plant in consideration of an annual rental of \$1, and performance of the conditions of the simultaneous contracts, makes the transaction unlawful. If this "lease" had stood alone it might well be a violation of the act. But it does not stand alone. It is, on the contrary, a mere incident of the contract of conditional sale, of which it is an integral but unnecessary part, to which it adds nothing save an instrument which could be recorded as that contract could not be. The contract of conditional sale provides that throughout the

twenty-year period thereof the purchaser, if he performs all his agreements, "may occupy, operate and use the steam plant." Thus, if the "lease" were canceled, the transaction would not be materially changed. Under these circumstances, I regard the lease as immaterial, and insufficient to taint an otherwise lawful transaction with illegality.

Moreover, as I am advised, the "lease," as such, has been by corporate action canceled, while the conditional sale stands, being evidenced by an escrow agreement in such form as to be made a matter of record.

Very truly yours,

HENRY A. WYMAN, *Attorney-General*.

Savings Deposits — Interest — Earned and collected.

Interest collected in advance on a note which runs for a period beyond the date of declaring interest on savings deposits is not income earned during the next preceding period.

JAN. 14, 1920.

HON. AUGUSTUS L. THORNDIKE, *Bank Commissioner*.

DEAR SIR: — I have your letter in which you make the following inquiry: —

If a trust company has collected its interest in advance on a note which runs on savings deposits, can such company say that it is income earned during the next preceding period? In other words, can I allow a trust company to pay a dividend on savings deposits from interest collected in advance, on the theory that it has been earned in accordance with such statute?

The statute referred to, Gen. St. 1919, c. 326, provides: —

Dividends or interest on the deposits in the savings departments of trust companies, savings banks and institutions for savings may be declared and paid for periods of not less than one month or more than six months, as determined by their by-laws, from income which has been earned and collected during the next preceding interest period.

The words of the statute are, "earned and collected." These terms are not synonymous. Something more than mere collection is evidently required to bring a sum collected within the meaning of the term "earned." To hold that mere collection is sufficient to satisfy the statute would in effect strike out therefrom the words "and earned."

In my opinion, interest collected in advance is earned only as the period for which it is collected runs. If collected for a period beyond the date of declaring the interest, it cannot be said to have been earned "during the next preceding" period.

There are decisions which hold that where interest has been collected in advance for the entire period of a loan, and there is a right on the part of the borrower to repay the principal before the expiration of such period, which right is exercised, the borrower is entitled to a return of the interest paid for the unexpired balance of the period. Such interest, though collected in advance, is clearly unearned.

I am therefore of the opinion that a trust company which has collected its interest in advance on a note which runs for a period beyond the date of declaring interest on savings deposits cannot say that the interest for the period beyond the dividend date is income earned during the next preceding period.

Very truly yours,

HENRY A. WYMAN, *Attorney-General*.

Superintendent of Buildings — Division of Highways — Lease of Quarters outside of Boston for Storage of Trucks — Authority to submit Same to Governor and Council.

It is within the jurisdiction of the Superintendent of Buildings to lay before the Governor and Council a proposal to lease storage space outside the city of Boston for the use of the Division of Highways of the Department of Public Works, for the storage of trucks and outfit of the division.

JAN. 15, 1920.

Mr. FRED H. KIMBALL, *Superintendent of Buildings*.

DEAR SIR: — You have referred to me a letter to you, dated January 2, from Mr. F. I. Bieler, secretary of the Division of Highways of the Department of Public Works, in which he requests you to lay before the Governor and Council for their approval a proposal to hire a stable in Middleborough for the storage of certain trucks and outfit of the Division of Highways of the Department of Public Works. You inquire whether this matter is within your jurisdiction.

Gen. St. 1919, c. 350, § 17, provides that all the rights, powers, duties and obligations of the Sergeant-at-Arms, as defined in R. L., c. 10, §§ 4, 8 and 9, St. 1909, c. 514, § 2, St.

1913, c. 711, and Gen. St. 1915, c. 224, are hereby transferred to the Superintendent of Buildings, and shall hereafter be performed by him. R. L., c. 10, § 4, provides, in part: —

He [the sergeant-at-arms] shall have general charge and oversight of the state house and its appurtenances and of any other buildings in Boston owned by or leased to the commonwealth for the use of public officers. . . .

I am orally informed by the Sergeant-at-Arms that at the time when this section was enacted quarters for State officers were almost entirely confined to the city of Boston. Since that time quarters for various boards and commissions have been required to a much greater extent throughout the State. The practice, therefore, grew up of submitting proposed leases of such quarters to the Governor and Council, for their approval, such submission being made through the Sergeant-at-Arms. In this way such proposed leases came before the Governor and Council through a single channel, whereby confusion and waste were avoided. This practice seems to have been to some extent recognized and approved by the Legislature, which, by St. 1910, c. 326, § 1, provided, subject to certain exceptions not here material: —

The governor, with the advice and consent of the council, may assign the rooms in the state house and rooms elsewhere, used by the commonwealth, and may determine the occupancy thereof in such manner as the public service may from time to time require: . . .

Gen. St. 1919, c. 350, § 19, provides in part: —

The superintendent of buildings shall have charge of purchasing all office furniture, fixtures and equipment, stationery and office supplies for all executive and administrative departments and divisions and boards thereof, except paper for the state printing contract, which shall be bought by the secretary of the commonwealth as heretofore, and shall direct the making of all repairs and improvements in the state house and on the state house grounds. All said departments, and the divisions and boards thereof shall make requisition upon the superintendent of buildings for all office furniture, fixtures and equipment, stationery and office supplies which they may require, and for any repairs or improvements which may be necessary in the state house or in other buildings or parts of buildings owned, occupied by or leased to the commonwealth and occupied by said departments, divisions and boards. . . .

While the matter is, perhaps, not entirely clear, viewed in the light of the statutes alone, I am of opinion that, in view of the long-continued practice above referred to, it is within your jurisdiction, as Superintendent of Buildings, to lay before the Governor and Council the proposal to hire storage space in Middleborough for the use of the Division of Highways of the Department of Public Works.

Yours very truly,

HENRY A. WYMAN, *Attorney-General*.

International Law — Taxation — Property owned by a Foreign Government.

It is a settled principle that jurisdiction is not asserted by a nation against foreign sovereigns or their sovereign rights.

In the light of this principle the tax statutes of the Commonwealth must be construed as not asserting any power to tax against a foreign sovereign.

JAN. 15, 1920.

HON. WILLIAM D. T. TREFRY, *Commissioner of Corporations and Taxation*.

DEAR SIR: — You ask my opinion as to whether taxes may legally be assessed in this Commonwealth upon tangible personal property of a taxable character, located therein on April 1 of any year, and owned by a foreign government. The specific property to which your inquiry relates consisted of bales of linters held in storage in Chicopee on April 1, last, in one instance owned by the government of Great Britain and under the control of the Imperial Munitions Board of the Dominion of Canada, and in another instance owned by the French Republic and under the control of the French High Commission, Munitions Department.

In my opinion, your inquiry must be answered in the negative.

I assume that this property either was manufactured in Massachusetts or had otherwise acquired a permanent *situs* here, so that it would be taxable if owned by a non-resident individual or a foreign corporation.

It is true that our statutes purport to tax "all property, real and personal situated within the commonwealth . . . unless expressly exempted by law" (St. 1909, c. 490, pt. I, § 2), and that there is no express statutory exemption of the property of foreign governments. Yet this provision must be

construed in the light of established principles of international law and comity.

The jurisdiction of each independent nation is necessarily exclusive and absolute within its own territory. However, by common consent among civilized nations, a consent largely implied from common usage and the necessities of mutual intercourse, that absolute jurisdiction is not asserted against foreign sovereigns or their sovereign rights. Whether this be called a rule of comity or of law, it has become a settled principle of international relations which has long been recognized by the Supreme Court of the United States. *Schooner Exchange v. M'Faddon*, 7 Cranch, 116. It is settled that the courts of one nation will assert no jurisdiction either against the person or the property of a foreign sovereign. *Briggs v. Lightboats*, 11 Allen, 157, 184.

In accordance with this principle, our Supreme Judicial Court refused to entertain an action of tort in our courts against a railroad owned directly by the sovereign of Great Britain, although jurisdiction in the usual sense of the term was obtained by attachment by trustee process of the property of the railroad located in Massachusetts. *Mason v. Intercolonial Railway*, 197 Mass. 349.

It follows that, even in the event that a tax of the character now in question were valid, no proceedings could be had in any court in the Commonwealth to enforce its payment, either against the foreign government or the property taxed so long as it was owned by that government. This fact alone strongly indicates that it was never intended by our statutes to impose such a tax. But the rule upon which these decisions are based goes much deeper than a refusal to assert mere judicial jurisdiction. It involves a waiver of all sovereign power. If a nation permits a foreign sovereign or his or its official representatives to enter the territory of that nation or to hold property therein, it impliedly consents that all sovereign rights of such foreign nation shall be recognized. One of these essential rights is independence of every other sovereign. For the Commonwealth to impose a tax upon the property of any sovereign within its borders would not only be exercising a jurisdiction to interfere with the rights of that sovereign in such property, but would be taking the further step of attempting to impose an obligation upon such sovereign to contribute toward the public expenses_{es} of

the Commonwealth. It would be asserting a jurisdiction more fundamental in character, even, than judicial jurisdiction. In my judgment, the tax statutes of the Commonwealth must be read in the light of these principles, and, when so read, they must be construed as not asserting any power to tax which is at variance with them.

Accordingly, in my opinion, taxes of the character referred to in your inquiry cannot legally be assessed in this Commonwealth.

Yours very truly,

HENRY A. WYMAN, *Attorney-General*.

*Prisoners — Sentence — Discharge of Common Night Walker
from House of Correction.*

The authority conferred by R. L., c. 225, upon the county commissioners, or, in the city of Boston, upon the penal institutions commissioner, to release persons sentenced to a house of correction is confined to persons sentenced as common night walkers under R. L., c. 212, § 55.

JAN. 15, 1920.

HON. SANFORD BATES, *Commissioner of Correction*.

DEAR SIR:— You inquire “whether, under R. L., c. 225, § 123, the county commissioners, or in the city of Boston the penal institutions commissioner, have a right to release any person sentenced to a house of correction in accordance with the terms of that section, or whether such right applies only to persons convicted in the manner described in lines 7, 8, 9 and 10 of that section.”

R. L., c. 225, § 123, provides, in part:—

The county commissioners, or, in the city of Boston, the penal institutions commissioner, subject to the approval of a justice of the court which imposed the sentence, after six months from the time of sentence, may discharge a person sentenced to the house of correction, and the directors of a workhouse may discharge a person sentenced thereto upon a conviction under the provisions of section fifty-five of chapter two hundred and twelve of being a common night walker, if they are satisfied that the prisoner has reformed, or, for any term during the period of the sentence, they may bind out such prisoner as an apprentice or servant to any inhabitant of the commonwealth. . . .

In my opinion, this provision is confined to the discharge of a person sentenced as a common night walker under R. L.,

c. 212, § 55. To extend section 123 to all persons "sentenced to the house of correction" would conflict with R. L., c. 225, § 121, which contains the general provisions for release upon probation of "any person who is imprisoned in a jail or house of correction." I am confirmed in this view by an opinion rendered on Feb. 3, 1917, by Hon. Henry C. Attwill, Attorney-General, to Thomas C. O'Brien, Deputy Director of the Bureau of Prisons.

Yours very truly,

HENRY A. WYMAN, *Attorney-General*.

Schools — Teaching of Thrift.

R. L., c. 42, § 1, as amended by St. 1908, c. 181, and St. 1910, c. 524, permits but does not require that thrift shall be taught in the public schools.

JAN. 16, 1920.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR: — You inquire whether instruction in thrift in the public schools is legally required by St. 1910, c. 524. That statute provides as follows: —

Section one of chapter forty-two of the Revised Laws, relating to the subjects that shall be taught in the public schools, as amended by chapter one hundred and eighty-one of the acts of the year nineteen hundred and eight, is hereby further amended by inserting after the word "ethics", in the twenty-fourth line, the word: — thrift.

R. L., c. 42, § 1, as amended by St. 1908, c. 181, provides, in part, that "special instruction" as to certain subjects "shall be taught as a regular branch of study to all pupils in all schools which are supported wholly or partly by public money," with certain exceptions. The next sentence provides: "Bookkeeping, . . . civil government, ethics and such other subjects as the school committee consider expedient may be taught in the public schools."

St. 1910, c. 524, provides that the word "thrift" shall be inserted in the above sentence after the word "ethics." The act is, however, entitled "An act to provide for compulsory instruction in thrift in the public schools." The precise question is whether this title renders the provision for instruction in thrift mandatory.

I am of opinion that it does not. The title of an act, of

itself, cannot be held to control or enlarge the words of the statute unless they are doubtful or ambiguous. The sentence of R. L., c. 42, § 1, in which the word “thrift” is inserted, is clearly permissive, not mandatory. If so, the title of St. 1910, c. 524, cannot control or change its meaning. If there were any doubt as to this conclusion, it seems to be removed by Gen. St. 1917, c. 169, and Gen. St. 1918, c. 257, § 174, both of which re-enact the provision for instruction in thrift in the permissive form.

Yours very truly,

HENRY A. WYMAN, *Attorney-General*.

Elections — Corrupt Practices — Political Committees — Expenditure of Money.

Review of law relative to use of money in primaries and elections, and the powers of political committees, candidates and other persons defined.

JAN. 19, 1920.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth*.

DEAR SIR: — You have asked five questions arising under the law relating to corrupt practices at elections (St. 1913, c. 835, as amended by St. 1914, c. 783, and Gen. St., 1916, c. 161). I will answer your questions *seriatim*.

1. Is a committee organized for the purpose of aiding the nomination, election or defeat of a candidate a “political committee”?

A similar question was submitted to one of my predecessors in office, who ruled that a political committee consisting of five or more persons selected and appointed by a candidate or a political party, or combination for the purpose of aiding the election of such candidate, was a political committee, within the meaning of the statute; but from a careful consideration of the corrupt practices act and its history I feel obliged to dissent from this ruling. Under the provisions of the original law of 1913 the term “political committee” applied “to every committee or combination of three or more persons who shall aid or promote the success or defeat of a political party or principle in a public election or shall aid or take part in the nomination, election or defeat of a candidate for public office.” By the act of 1914, as amended

by Gen. St. 1916, c. 161, this portion of the law was changed, and the term "political committee" was made to apply "to every committee or combination of three or more persons who shall aid or promote the success or defeat of a political party or principle in a public election, or shall favor or oppose the adoption or rejection of a constitutional amendment or other question submitted to the voters."

It is not to be presumed that the change was unintentional, and it is my opinion that a committee organized for the purpose of aiding the nomination, election or defeat of a candidate is not a political committee.

2. What is the meaning of the words "public election" ?

It will be noted that the words "public election" appear in Gen. St. 1916, c. 161, as quoted in the discussion of your first question. While the election laws of 1913 do not give a definition, the meaning of these words may be inferred from the following definitions: "city election" shall apply to any election held in a city for the choice of a city officer by the voters, whether for a full term or for the filling of a vacancy; "town election" shall apply to any meeting held for the election of town officers by the voters, whether for a full term or for the filling of a vacancy; "state election" shall apply to any election held for the choice of a national, State, district or county officer by the voters, whether for a full term or for the filling of a vacancy. "Primary" shall apply to a joint meeting of municipal or political parties held under the provisions of the act relating to primaries.

It is obvious that while a primary has much of the machinery of an election, it is not an election at all. It nominates but does not elect. The words "public election" include elections by a town, city or State, or subdivisions thereof, but cannot include a primary.

3. May a committee organized to promote the nomination or election of a candidate expend money for advertising purposes, printing or distributing letters or circulars in its behalf ?

In my answer to your first question I have said that a committee organized to aid the nomination, election or defeat of a candidate is not a political committee. The committee so organized has no standing as a political committee,

and therefore its members can do no more than an individual can do in their support of a candidate. The law is clearly stated in St. 1914, c. 783, § 5, which is as follows: —

No person, except a person acting under the authority or in behalf of a political committee having a treasurer, or a candidate for nomination or election to a public office, or person acting under his authority, shall receive money or its equivalent, or expend, disburse or promise to expend or disburse money or its equivalent, to aid or promote the success or defeat of a political party or principle or a constitutional amendment or other question submitted to the voters in any election, or to aid or influence the nomination, election or defeat of a candidate for office: *provided, however*, that nothing herein shall be construed to prohibit any individual, not a candidate, from contributing to political committees or to candidates a sum which in the aggregate of all contributions by him shall not exceed one thousand dollars in any election and primary preliminary thereto; and *provided, also*, that nothing herein shall be construed to prohibit the rendering of services by speakers, publishers, editors, writers, checkers and watchers at the polls or by other persons for which no compensation is asked, given or promised, expressly or by implication; nor to prohibit the payment by themselves of such personal expenses as may be incidental to the rendering of such services; and nothing herein shall be construed to prohibit the free use of property belonging to an individual and the exercise of ordinary hospitality for which no compensation is asked, given or promised, expressly or by implication.

Thus, neither an individual nor a campaign committee of an individual candidate can lawfully expend money in behalf of a party or a candidate except to contribute to a candidate's personal fund or to a duly constituted political committee. The reason for this is obvious, inasmuch as a candidate must make a return of his personal expenses, and a political committee must make a return of the party expenses. It was plainly the intention to confine direct expenditures to persons or groups of persons who are required to make return. It cannot be considered that it was intended to leave an easy means of escape from the limitation of expenditures established by statute.

In my opinion, the statute makes it unlawful for any person or combination of persons, except candidates or political committees, to defray any election expenses except by contributions as above stated.

4. May a committee organized for the express purpose of promoting the success of a political party expend money for advertising purposes, printing or distributing letters or circulars in behalf of an individual candidate?

A committee such as is described in this question is clearly a political committee, and the rights and limitations of such a committee are set forth in St. 1914, c. 783, § 3, as follows:—

Political committees, duly organized, may receive, pay and expend money or other things of value for the purposes authorized by this act, and may contribute to other political committees. The authorized purposes of expenditure shall be advertising, writing, printing and distributing circulars or other publications, hire and maintenance of political headquarters, and clerical hire incidental thereto, meetings, refreshments other than intoxicating liquors, decorations and music, postage, stationery, printing, expressage; traveling expenses of committee, speakers and clerks, telephone, telegraph and messenger service, hire of not more than one conveyance and not more than two persons at each polling place on election day: *provided, however*, that not more than one such conveyance and not more than two persons at each polling place shall be hired to represent the same political party or principle.

A political committee may contribute to the personal fund of a candidate, but no such committee shall pay, directly or indirectly, any personal expenses of any candidate for nomination or election, except by such a contribution to the fund of the candidate. The following expenses shall be deemed, for the purposes of this act, to be personal expenses:—Traveling expenses of a candidate and expenses properly incidental thereto, writing, printing and distributing any letter, circular or other publication or advertisement of or for an individual candidate, meetings and refreshments for the sole benefit of an individual candidate, hire and maintenance of personal political headquarters, and clerical hire incidental thereto, stationery, postage, telephone, telegraph and messenger service of an individual candidate, preparing, circulating and filing nomination papers, and the hire of conveyances and workers at primaries.

It will be observed that the first paragraph provides what a political committee may do, and the second what it may not do. It may expend money for the benefit of the party, but not for the benefit of an individual candidate. It can, therefore, have nothing to do with relation to primaries, nor may it expend money for any individual candidate for elec-

tion apart from aiding or promoting the success or defeat of a political party.

5. May an individual not a candidate expend money in support of a nomination or election of a candidate or for the success of a political party in a public election?

In connection with my answer to your third question you will find quoted section 5 of chapter 783 of the Acts of 1914, in which may be found the answer to this question. No individual not a candidate can lawfully expend money in advertising or for any other purpose in behalf of a candidate for nomination or election or to aid a political party at an election except by contribution to the personal fund of such candidate or to a political committee.

Moreover, assuming that St. 1914, c. 783, § 5, is constitutional, it forbids any person to spend money for political advertisements, even in the form required by St. 1913, c. 835, § 354, unless such expenditures are made by or under the authority of a political committee or candidate, who must include them in his or its return.

Very truly yours,

HENRY A. WYMAN, *Attorney-General*.

License to store Inflammable Liquid — Appeal to Commissioner of Public Safety from Order of State Fire Marshal.

Under Gen. St. 1919, c. 350, § 109, a person "affected" by an order of the State Fire Marshal, made under St. 1914, c. 795, § 18, by which the State Fire Marshal affirmed a permit to store a volatile inflammatory liquid, granted by the license commissioners of Cambridge, may appeal to the Commissioner of Public Safety, who shall grant a hearing upon such appeal.

JAN. 26, 1920.

Col. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — I am in receipt of your request for an opinion as to your duty to grant a hearing on an appeal from an order of the State Fire Marshal affirming the granting of a permit to store volatile inflammatory liquid by the license commissioners of Cambridge. The facts briefly are these: said commissioners were given power by the Fire Prevention Commissioner of the Metropolitan District, acting under the

provisions of St. 1914, c. 795, § 4, to issue permits for the storage of inflammatory liquids, as authorized by section 6 of said chapter, and a permit was duly granted by said commissioners.

A person living in the vicinity where said liquid was sought to be stored, claiming to be aggrieved by the action of the commissioners, appealed to the State Fire Marshal for a hearing under the provisions of section 18 of said chapter 795, the State Fire Marshal being the successor in office of the Fire Prevention Commissioner.

Following a hearing held by the State Fire Marshal, an order was issued affirming the decision of the license commissioners.

The appellant now seeks a further hearing before the Commissioner of Public Safety under the provisions of Gen. St. 1919, c. 350, § 109, which reads as follows: —

Any person affected by an order of the department or of a division or office thereof, may, within such time as the commissioner may fix, which shall not be less than ten days after notice of such order, appeal to the commissioner, who shall thereupon grant a hearing, and after such hearing may amend, suspend or revoke such order. Any person aggrieved by an order approved by the commissioner may appeal to the superior court: *provided*, such appeal is taken within fifteen days from the date when such order is approved. The superior court shall have jurisdiction in equity upon such appeal to annul such order if found to exceed the authority of the department, and upon petition of the commissioner to enforce all valid orders issued by the department. Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy.

St. 1914, c. 795, § 18 provides that —

The commissioner [State Fire Marshal] shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons, acting or purporting to act under authority of the commissioner, done or made or purporting to be done or made under the provisions of this act, and shall make all necessary and proper orders thereupon, and any person aggrieved by any such action of the head of a fire department or other person shall have an absolute right of appeal to the commissioner.

Concisely stated, a person aggrieved at the action of a board or commission to whom the Fire Prevention Commissioner, now the State Fire Marshal, has delegated power to act, may appeal to said State Fire Marshal, who shall hear

and determine the appeal and make an order thereon; and any person who is affected by an order of said State Fire Marshal may appeal to the Commissioner of Public Safety, who shall grant a hearing, and he may amend, suspend or revoke the order.

I must therefore advise you that you are required to grant a hearing to the appellant on the facts as stated.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Retirement — Employee who leaves the Service and later returns to it.

Where a member of the State Retirement Association leaves the service of the Commonwealth and receives a refund of the amount contributed by him to the association, in accordance with St. 1911, c. 532, § 6, par. 2, but returns to the service of the Commonwealth within five months, being then under fifty-five years of age, he begins a new term of employment in respect of which he is not entitled to credit because of his former employment, either for the purpose of reinstatement in the association or for the purpose of determining the period of service which will entitle him to retire with a pension.

JAN. 28, 1920.

Board of Retirement.

GENTLEMEN: — I have your request for my opinion upon certain questions in connection with the interpretation of St. 1911, c. 532, as amended, as applied to the following facts: —

A member of the Retirement Association resigns from the service of the Commonwealth, and a refund is made to him upon his application and notice of withdrawal from his employment, in accordance with the provisions of St. 1911, c. 532, § 6, par. (2) A (a).

Within five months, being then under fifty-five years of age, he returns to the position from which he had resigned, and makes written application to your Board for reinstatement in the Retirement Association, enclosing therewith his check for the amount which had been refunded to him.

Your first question is whether or not the law will permit your Board to reinstate him under such a basis.

Your second question is whether or not he would be entitled to any credit for the period of continuous service rendered prior to the date of his last appointment.

These questions are interrelated and will be treated as one.

St. 1911, c. 532, § 2, provides for the establishment of a retirement system, and section 3 of said chapter 532 provides for the organization of a retirement association among the employees of the Commonwealth.

Section 3, paragraph 1, provides that —

All employees of the commonwealth, on the date when the retirement system is established, may become members of the association. . . .

Section 3, paragraph 2, provides that —

All employees who enter the service of the commonwealth after the date when the retirement system is established, except persons who have already passed the age of fifty-five years, shall upon completing ninety days of service become thereby members of the association. . . .

Section 6, paragraph (2) *A (a)*, provides that —

Should a member of the association cease to be an employee of the commonwealth for any cause other than death, . . . before becoming entitled to a pension, there shall be refunded to him all the money paid in by him under section five, (2) *A*, with such interest as shall have been earned thereon.

Section 6, paragraph (2) *B*, provides that —

Any member who reaches the age of sixty years and has been in the continuous service of the commonwealth for fifteen years immediately preceding, and then or thereafter retires or is retired, . . . shall receive an annuity. . . .

The member, having been an employee at the time that the retirement system was established, became a member of the Retirement Association under the provisions of section 3, paragraph (1). Having resigned prior to the expiration of fifteen years of continuous service, he was not entitled to any pension, but was entitled to the refund provided for in said section 6, paragraph (2) *A (a)*. This refund was granted to him by your Board and was accepted by him. His acceptance of the refund clearly shows that he intended at the time of his resignation to permanently discontinue in the employ of the Commonwealth.

St. 1911, c. 532, § 1 (*f*), reads as follows: —

The words "continuous service" mean uninterrupted employment, with these exceptions: — a lay-off on account of illness or reduction of force, and a leave of absence, suspension or dismissal followed by reinstatement within two years. . . .

Under the provisions of section 6, paragraph (2) *B*, as defined by section 1 (*f*), the fifteen years of employment must be uninterrupted other than for the exceptions mentioned therein. Should your Board consider his voluntary resignation in the light of a subsequent return to the position which he had resigned as a mere interruption of the period of his employment, the time spent in the service of the Commonwealth prior to his resignation could still not be considered as part of a continuous service, since voluntary resignation is not included in the exceptions mentioned in said section 1 (*f*).

Under section 4, paragraph (4), of said act your Board is authorized to make by-laws and regulations, provided they are "not inconsistent with the provisions of this act."

No express provision for the reinstatement of a member who voluntarily resigns from the association appears in the act. Reinstatement in the association, together with the acceptance by your Board of a check for the amount which had been refunded to him, would revive the continuity of the term of his employment prior to the time of his resignation. Such act on the part of your Board would in effect constitute an additional exception to those specifically mentioned in said section 1 (*f*), and would result in giving an interpretation to the words "continuous service" contrary to that as defined by said section 1 (*f*). Any provision made by your Board permitting his reinstatement would clearly be inconsistent with the provisions of the act, and therefore illegal.

His term of employment having terminated, he would, upon re-entering the service of the Commonwealth, become a member of the association under the provisions of section 3, paragraph (2), and the term of fifteen years would commence to run from said date.

In view of the fact that his resignation constituted a termination of the first term of his employment, said term must be disregarded. I am therefore of the opinion that your Board could not lawfully reinstate him nor would he be entitled to any credit for the period of continuous service rendered by him prior to the date of his last employment.

Your third question is whether or not this member, if not allowed credit for the period of service from the time of the establishment of the Retirement Association to the date of his resignation, would, on completion of fifteen years of continuous service immediately preceding retirement at the age of sixty or over, be entitled to the pension for the period of service rendered prior to the establishment of the Retirement Association as provided by section 6, paragraph (2) *C (b)*, by virtue of the fact that he had been in the service of the Commonwealth at the time the system went into effect.

Section 6, paragraph (2) *C (b)*, provides as follows: —

. . . Any member of the association who reaches the age of sixty years, having been in the continuous service of the commonwealth for fifteen years or more immediately preceding, and . . . thereafter retires or is retired, . . . shall receive in addition to the annuity and pension provided for by paragraphs (2) *B* and *C (a)* of this section, an extra pension for life as large as the amount of the annuity and pension to which he might have acquired a claim if the retirement system had been in operation at *the time when he entered the service of the commonwealth*. . . .

This section was clearly enacted by the Legislature for the purpose of rewarding such of the employees of the Commonwealth as had been in its employ prior to the time of the establishment of the retirement system, who remained in its continuous service and who would be compelled to leave the service by the terms of the act, by providing them with a reasonable retirement allowance. Had the member remained in the continuous service of the Commonwealth he would unquestionably, under the provisions of said section, have been entitled to the additional pension as therein provided. His voluntary resignation from the service of the Commonwealth terminated his first employment. His subsequent re-employment and readmission constituted, for the purpose of this act, the actual beginning of the term of his employment in the service of the Commonwealth, and did not revive the former term.

Having voluntarily resigned and having thereby terminated the period of his employment which was in operation at the time the retirement system went into effect, he thereby forfeited whatever right he might have had to the special benefits provided for in said section 6, paragraph (2) *C (b)*.

I am of the opinion that the term "when he entered the service of the commonwealth," as used in said section 6, paragraph (2) *C (b)*, would in his case apply to his re-entry into the service, which was after the establishment of the retirement system, and that he would therefore not be entitled to the additional pension for the period of continuous service rendered prior to the time the retirement system went into effect.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Banks and Banking — Collections — Right of Collecting Bank to become Debtor for Sum collected — Money on Storage — Defunct Trust Company.

Where a draft is transmitted to a trust company for collection and is collected by it while the trust company is still solvent and open for business, the proceeds of such draft constitute a debt, and cannot be recovered in specie, under St. 1910, c. 399, § 12, as money "in its . . . possession for storage or safekeeping," even though the trust company is closed by the Commissioner of Banks under authority of St. 1910, c. 399, § 2, before the treasurer's check, transmitted in payment of the proceeds of said draft, is presented to the trust company for payment.

Seem that if the draft had been collected after the trust company had closed its doors or was known by its officers to be insolvent the proceeds thereof would be held in trust, and could be recovered in specie by the owner of the draft.

Seem that where a draft is transmitted to a trust company for collection the trust company holds it in a fiduciary capacity until collected.

JAN. 30, 1920.

HON. AUGUSTUS L. THORNDIKE, *Bank Commissioner*.

DEAR SIR: — I have considered the inquiry contained in your recent letter. As I understand your letter, supplemented by an oral interview, the case is this: —

A draft was drawn upon the X Company, a Massachusetts concern, payable at the Old South Trust Company on Dec. 16, 1919. It was transmitted to the Old South Trust Company for collection by the First National Bank of —, —. The drawee brought in a certified check on Dec. 16, 1919, which was received in payment of the draft. On the same day (Dec. 16, 1919), the Old South Trust Company drew a check on itself, signed by its treasurer, to the order

of said First National Bank, and mailed it to that bank in payment of the collection. On Dec. 18, 1919, the Bank Commissioner, acting under the authority of St. 1910, c. 399, closed the Old South Trust Company. The said treasurer's check was thereafter presented to the Old South Trust Company and went to protest. You further inform me that it is a usual custom of banks and trust companies to pay such collection items by a cashier's or treasurer's check drawn on themselves. You ask whether the proceeds of this collection are money or property held by the trust company "in storage or safekeeping," within the meaning of St. 1910, c. 399, § 12.

St. 1910, c. 399, § 12, provides, in part, as follows:—

Should any corporation or individual banker, at the time when the bank commissioner takes possession of the property and business of such corporation or banker, have in its or his possession for safe keeping and storage, any jewelry, plate, money, securities, valuable papers or other valuable personal property, or should it or he have rented any box, safes, or safe deposit boxes, or any part thereof, for the storage of property of any kind, the bank commissioner may at any time after taking possession as aforesaid cause to be mailed to the person claiming to be, or appearing upon the books of the corporation or banker to be, the owner of such property, or to the person in whose name the safe, vault, or box stands, a notice in writing in a securely closed post-paid, registered letter, directed to such person at his postoffice address as recorded upon the books of the corporation or banker, notifying such person to remove, within a period fixed by said notice and not less than sixty days from the date thereof, all such personal property; and upon the date fixed by said notice, the contract, if any, between such persons and the corporation or banker for the storage of said property, or for the use of said safe, vault or box, shall cease and determine, and the amount of the unearned rent or charges, if any, paid by such person shall become a debt of the corporation or banker to such person. . . .

The question, therefore, is whether the Old South Trust Company could and did make itself the debtor of the First National Bank of — for the proceeds of this collection, or whether it held the specific money collected for delivery to its correspondent.

The general rule is that where commercial paper is transmitted to a bank for collection, the bank holds such paper as agent for the apparent owner until the collection is made.

Manufacturers' Bank v. Continental Bank, 148 Mass. 553, 557; *Freeman's National Bank v. National Tube Works*, 151 Mass. 413, 417; *Commercial Bank v. Armstrong*, 148 U. S. 50; 7 Corpus Juris, pp. 597, 598, note 33. But the great weight of authority and the rule in this State appears to be that when the collection is made, the collecting bank may, by custom, mingle the proceeds with its general funds and become a debtor for the amount collected. *Manufacturers Bank v. Continental Bank*, 148 Mass. 553, 558; *Freeman's National Bank v. National Tube Works*, 151 Mass. 413, 418; *Commercial Bank v. Armstrong*, 148 U. S. 50. This custom may, of course, be modified by express directions (7 Corpus Juris, pp. 616, 617, notes 71, 72), and is further qualified by the implied condition that at the time the collection is made the bank has not closed its doors or is not known by its officers to be insolvent. *Manufacturers' Bank v. Continental Bank*, 148 Mass. 555, 559; *Western German Bank v. Norrell*, 134 Fed. Rep. 724; *St. Louis & S. F. Ry. Co. v. Johnston*, 133 U. S. 566; 7 Corpus Juris, p. 616, note 70. In other words, the authority of the bank to change its relation to the owner of the paper from agent to debtor ceases when the bank has closed its doors or is known by its officers to be insolvent. (See cases last cited.)

In the present case the collection was complete upon Dec. 16, 1919. You inform me that the bank was not then, and in your judgment is not now, insolvent. Its doors were not closed until Dec. 18, 1919. It does not appear that there was any direction to transmit the specific money collected to the owner of the draft, or that the treasurer's check of the Old South Trust Company was rejected and the proceeds of the collection claimed in specie. Under these circumstances, and in the absence of any further facts, I am of opinion that the Old South Trust Company could and did make itself a debtor for the proceeds of this collection. Such a debt is not within St. 1910, c. 399, § 12.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Insane Person — Surgery — Right to operate on Insane Patient without Consent — Quarantine without Consent, of Insane Patient who is Dangerous or afflicted with a Contagious Disease — Vaccination of Insane Patient.

The superintendent of a State insane hospital has no authority to draw small quantities of blood and spinal fluid from a patient for purposes of diagnosis and treatment unless the patient, if competent, or his guardian, if he is incompetent, consents.

If a patient be dangerous or afflicted with a contagious or infectious disease, he may be quarantined, even against his will or the will of his guardian.

If the conditions prescribed by R. L., c. 75, § 138, are satisfied, a patient may be vaccinated against his will or that of his guardian.

JAN. 30, 1920.

DR. GEORGE M. KLINE, *Commissioner of Mental Diseases.*

DEAR SIR:— You inquire whether superintendents of State insane hospitals have authority to draw small quantities of blood and spinal fluid from a patient for purposes of diagnosis and treatment, “notwithstanding the objections of the patient or his guardian or relatives.”

Under date of Feb. 14, 1916, an opinion was rendered by this Department to the effect that lumbar punctures could not be made on patients without their consent, or the consent of their guardians if such patients were themselves incompetent to give such consent, where such punctures were made for the purpose of experiment or research.

On March 25, 1916, this Department rendered a further opinion to the State Board of Insanity that lumbar punctures cannot be made upon a patient in an insane hospital, even for purposes of diagnosis and treatment, unless the patient (if competent) or the patient's guardian consents. IV Op. Atty.-Gen., 531. See also *McClallen v. Adams*, 19 Pick. 333; *Purchase v. Seelye*, 231 Mass. 434, 438.

In the light of these authorities I am of opinion that consent, either express or by conduct, is a condition of both surgical and medical treatment in the case of sane persons. *McClallen v. Adams*, 19 Pick. 333. But such consent may be manifested by conduct, either of the patient himself or of one who has authority to give such consent. *McClallen v. Adams*, 19 Pick. 333. In an emergency such consent may sometimes be presumed. *Mohr v. Williams*, 95 Minn. 261.

The rule appears to be the same for insane patients. *Pratt v. Davis*, 224 Ill. 300. If the patient is competent to give consent, his assent, either express or by conduct, is a condition of treatment. IV Op. Atty.-Gen., 531. If the patient is incompetent, the consent of his guardian, either express or by conduct, is a condition of treatment. IV Op. Atty.-Gen., 531. It may be that the Legislature might modify this rule to some extent in the case of persons committed to State institutions. *Commonwealth v. Pear*, 183 Mass. 242; *Jacobson v. Massachusetts*, 197 U. S. 11. See also Gen. St. 1918, c. 58, § 2, and opinion of the Attorney-General to the State Department of Health under date of Aug. 22, 1919, as to physical examination of inmates of the penal institutions named in that act. I find no similar statute applicable to inmates of State insane hospitals. I am therefore of opinion that where the patient (if competent) or his guardian (if the patient be incompetent) has expressly forbidden a given sort of medical or surgical treatment, that prohibition is effective and such treatment may not be administered.

To avoid misunderstanding, let me add two general qualifications. In the first place, if a patient be dangerous or afflicted with a contagious or infectious disease, he might, in my opinion, be segregated and quarantined even against his will, for the protection of other inmates. In the second place, the Legislature has, by R. L., c. 75, § 138, made express provision for vaccination. That section provides as follows:—

The board of health of a city or town in which any incorporated manufacturing company, almshouse, reform or industrial school, hospital or other establishment where the poor or sick are received, prison, jail or house of correction or any institution which is supported or aided by the commonwealth is situated may, if it decides that it is necessary for the health of the inmates or for the public safety, require the authorities of said establishment or institution, at the expense thereof, to cause all said inmates to be vaccinated.

See *Commonwealth v. Pear*, 183 Mass. 242; *Jacobson v. Massachusetts*, 197 U. S. 11.

I am of opinion that, if the conditions provided in R. L., c. 75, § 138, are satisfied, a patient might be vaccinated even against his will or that of his guardian.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Constitutional Law — Provisions for raising Tax to pay Bonds
no Contract with Bondholder or Taxpayer — Taxes not
Borrowed Money — Application of Tax to Different Pur-
pose.*

Money raised by taxation to repay a loan is not "borrowed money," within the meaning of Mass. Const. Amend. LXII, § 4.

The provisions of Gen. St. 1919, c. 283, § 9, with respect to the manner in which money shall be raised by State taxation to pay the bonds authorized by that act, do not constitute a contract with the bondholder.

The provisions of Gen. St. 1919, c. 283, § 9, that the purpose of the tax thereby imposed shall be stated upon the tax bill, do not constitute a contract with the taxpayer that the tax shall be applied to such purpose.

There is no constitutional provision which requires that the taxes raised under Gen. St. 1919, c. 283, § 9, shall be applied to the purpose stated therein.

The Legislature may constitutionally provide that payment of the \$10 bonus, authorized by Gen. St. 1917, c. 211, shall be made out of taxes raised under Gen. St. 1919, c. 283, to pay the \$100 bonus authorized by that act.

FEB. 3, 1920.

Joint Committee on Ways and Means.

GENTLEMEN: — You ask my opinion upon the following matter: —

Gen. St. 1919, c. 283, makes provision for the payment of \$100 each to soldiers, sailors and certain others, resident in Massachusetts, who served in the war with Germany. Section 9 of that act provides as follows: —

For the purpose of meeting the expenditures authorized by this act the treasurer and receiver general is hereby authorized, with the approval of the governor and council, to issue bonds or notes from time to time, as they are needed, to an amount not exceeding twenty million dollars, for such terms as the governor shall recommend to the general court in accordance with section three of Article LXII of the amendments to the constitution. Such bonds or notes shall be designated on the face thereof Massachusetts Military Service Loan, Act of 1919, shall be countersigned by the governor, and shall be deemed a pledge of the faith and credit of the commonwealth; and the principal and interest thereof shall be paid at the times specified on said bonds or notes in gold coin of the United States, or its equivalent. Said bonds or notes shall be disposed of in such manner as shall be deemed best by the treasurer and receiver general, who shall, when

issuing any of said bonds or notes, provide for the payment of the same in the manner prescribed by chapter three of the acts of nineteen hundred and twelve. The amount necessary to pay the principal of said loan as it matures, and the interest as it accrues, shall be raised by the assessment of a civilian war poll tax sufficient to provide not less than one half of the said amount, and the balance of such amount shall be raised by the imposition and levy of such assessments, rates and taxes, and of such duties and excises as the general court may hereafter deem just and expedient and may by law provide. All tax bills for the collection of taxes imposed to meet the amount of said principal and interest shall show on the face thereof that said taxes are imposed for the purpose of raising funds to provide for the payments hereby authorized to the soldiers and sailors of Massachusetts who served in the war with Germany. The tax commissioner shall have authority to make suitable regulations for enforcing this provision. Any person entitled to the benefits of this act shall, upon application to the board of assessors of the city or town in which he resides, receive an abatement of the additional war poll tax assessed upon him under the provisions of this section.

Section 10 provides for the levy of a poll tax of \$5 in the years 1920 to 1923, inclusive.

Gen. St. 1919, c. 307, provides that the bonds to be issued under chapter 283 shall be for a term not exceeding five years, and authorizes the issue of notes in anticipation, payable within not more than one year from issue. Under this act \$10,000,000 of notes have been issued. It is proposed to refund these notes this year by a bond issue maturing in the amount of \$2,500,000 on December 1 of each of the years 1920 to 1923, inclusive.

Gen. St. 1919, c. 342, imposes certain additional taxes (including a special State tax of \$650,000) for the purposes aforesaid, with provision for a statement of the purpose upon the tax bills. Section 7 further provides that the amounts collected under the act shall be set aside in a special fund to meet the bonus requirements and the notes and bonds, and interest thereon, and that "any surplus remaining in said fund after all such payments have been made shall be disposed of as the general court shall hereafter prescribe by law."

Gen. St. 1917, c. 211, § 1, provided for the payment of \$10 per month for a prescribed period to each soldier and sailor mustered into the military or naval service of the United States. Section 2 provided for a special issue of bonds or

notes, not exceeding \$1,500,000, for a term not exceeding five years.

It was and is anticipated that the amount required under the \$100 bonus law will be less than \$20,000,000, but that the amount required under the \$10 bonus law will exceed \$1,500,000.

Spec. St. 1919, c. 242, § 3 (the Supplementary Appropriation Bill), authorized the Treasurer and Receiver-General to pay a sum not exceeding \$200,000 *from the proceeds of the loan* authorized by Gen. St. 1919, c. 283 (the \$100 bonus law), to soldiers and sailors under Gen. St. 1917, c. 211 (the \$10 bonus law). None of this appropriation has been expended. Question has been made whether this provision is in violation of Mass. Const. Amend. LXII, § 4, which provides:—

Borrowed money shall not be expended for any other purpose than that for which it was borrowed or for the reduction or discharge of the principal of the loan.

In connection with a proposal to repeal section 3 of chapter 242 of the Special Acts of 1919 you make the following inquiry:—

May the General Court, by amendment to the acts creating the special taxes above mentioned or by new legislation, provide for the appropriation of the proceeds of any of said taxes to the payment of the \$10 bonus provided for by Gen. St. 1917, c. 211, before such time as all indebtedness incurred under the above-mentioned acts has been discharged and as all the \$100 bonus payments have been made or provided for? And if, in your opinion, such appropriation may be validly made at this time, what procedure would you suggest?

1. I am of opinion that money raised by taxation to repay a loan is not “borrowed money,” within the meaning of Mass. Const. Amend. LXII, § 4, quoted above. It follows that that amendment does not require that money so raised by taxation shall be applied to repay such loan.

2. In my opinion, the provisions of Gen. St. 1919, c. 283, § 9, with regard to the manner in which money shall be raised by taxation to repay the loan thereby authorized, do not enter into or become a part of the contract between the Commonwealth and note holders or bondholders. There is no express pledge of the proceeds of the taxes so imposed or

to be imposed, similar to the express pledge of rentals and tolls in the case of the East Boston tunnel. See *Opinion of the Justices*, 190 Mass. 605. Even in the case of a municipality, a pledge of the receipts from certain water works was not implied from ordinances placing such receipts in a special fund to meet bonds issued to build the water works. *Sinclair v. Fall River*, 198 Mass. 248, 253. The act provides that the bonds or notes "shall be deemed a pledge of the faith and credit of the commonwealth." I am informed that bonds of the Commonwealth have always been issued without security. Under these circumstances, I am of opinion that the provision of section 9 for the imposition of taxes to pay the bonds must be regarded as a statutory declaration of the legislative will, which may be amended at pleasure, rather than as a contract with the bondholders or note holders.

3. I am of opinion that the provisions for stating on the tax bills the purpose for which the tax is raised confer no right upon the taxpayer to insist that the proceeds of the tax be applied to payment of the \$100 bonus only. A statement of the reason for or purpose of the tax is not a declaration of trust which the taxpayer may enforce. Moreover, application of some part of the proceeds of the tax to the payment of the \$10 bonus is an application to a purpose of similar character, namely, care of soldiers and sailors who served in the late war. I suggest, however, that if any of the proceeds of these taxes are to be applied to the payment of the \$10 bonus the Commonwealth might well provide in any act for that purpose that the statement on the tax bill be so changed as to include payments under both acts.

4. I find no constitutional provision which requires that the taxes raised under or in connection with this act shall be applied to the purpose stated in the act.

I am therefore of opinion that the Legislature has power to provide that *taxes* raised under or in connection with Gen. St. 1919, c. 283, may be immediately used to pay the \$10 bonus provided for by Gen. St. 1917, c. 211. Mass. Const. Amend. LXII, § 4, applies only to the proceeds of the loan, and not to the taxes raised to pay it.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Civil Service — Fire Department — Promotion.

Under St. 1913, c. 487, as amended, and Civil Service Rule 34, a call captain of the fire department may not be promoted directly to the position of captain of the permanent force.

FEB. 4, 1920.

Division of Civil Service, Department of Civil Service and Registration.

GENTLEMEN: — St. 1913, c. 487, § 1, as amended by St. 1914, c. 138, provides as follows: —

Cities and towns which have a call or part call fire department which now is or may hereafter be subject to the civil service rules may, on the recommendation of the board of engineers of the fire department or of the officer or board having charge of the fire department, appoint as members of the permanent force without civil service examination any persons then in the call or part call fire department who have served as call men or part call men for five or more successive years: *provided*, that such persons are certified by the city or town physician to be competent physically for the duty. If there is no city or town physician, then the said certification shall be made by a physician designated for the purpose by the board of engineers or other authority, as aforesaid.

Gen. St. 1916, c. 119, provides that the term “call men or part call men,” as used in the above acts, shall be construed to include substitute call men. St. 1913, c. 487, which, by section 4, was subject to a referendum provision, was accepted by the town of Dedham on March 2, 1914. There are only seven permanent men in the Dedham fire department at present, none of whom are officers. All the officers are call men. Two men have served as call captains for more than five years. You inquire whether under the above acts and the rules of the civil service these two men may be promoted to the permanent force with the rank of captain, or whether they may be promoted only to the rank of private in the permanent force.

Paragraphs 1, 2 and 3 of Rule 34 of the Civil Service Rules provide as follows: —

1. In the Official Service, a promotion from one grade, as fixed by the rules or determined by the Commission, to another grade in the same class, shall not be valid until the candidate or candidates for promotion shall have been subjected to a competitive or non-competitive examination, as the Commission may decide (except as other-

wise required by law), and until the promotion shall have been authorized by the Commission.

2. So far as practicable, promotions shall be made by successive grades; and no person shall be designated for promotion or examined until he shall have served at least six months in the lower position except by special vote of the Commission.

3. No promotion or transfer from the call to the permanent fire force shall be allowed except after open competitive examination with all applicants for said force, except as otherwise provided by statute. No examinations shall be required for promotion of call men within the call force.

Former Attorney-General Thomas J. Boynton has already advised you that under St. 1913, c. 487, and the civil service rules, a call fireman cannot be promoted to the office of captain in the permanent force. IV Op. Atty.-Gen. 151.

It seems reasonably clear that appointment from the call force to the permanent force is a promotion by successive grade, within the meaning of Rule 34, paragraph 2. In my opinion, a call captain is, in spite of his rank, only a member of the call force. To appoint a call captain to the position of captain in the permanent force would, in my opinion, be equivalent to a promotion from call man to membership in the permanent force, and then from private in the permanent force to captain. I am of opinion that such appointment is not authorized by St. 1913, c. 487, as amended, and would conflict with both paragraph 1 and paragraph 2 of Rule 34.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Soldiers and Sailors — Military Aid — Person summoned to Active Service but discharged for Previous Disability — State Aid to Dependents of Such Person.

In view of the express provision of Gen. St. 1919, c. 290, § 9, which incorporates into said section 9 the limitations prescribed by section 3 of said act, a man enrolled in the United States Naval Reserve Force, who is called for active duty but who is almost immediately discharged for a disability which is not incurred in said service, is not entitled to military aid in the first, second, third or fourth classes defined by said section 9.

The dependents of a man enrolled in the United States Naval Reserve Force, who is summoned for active duty but is almost immediately discharged by reason of a disability which is not incurred in said service, are not entitled to receive State aid in the first, second, third or fourth classes defined by Gen. St. 1919, c. 290, § 3.

FEB. 4, 1920.

MR. RICHARD R. FLYNN, *Commissioner of State Aid and Pensions.*

DEAR SIR:— You request my opinion upon the following inquiry:—

Your official opinion is requested by this department as to the right of the State to pay State aid to the dependents of service men of the German War, and military aid to the ex-service men of the German War, who were officially enrolled in the United States Naval Reserve Force and who were later called to active duty but who were, before performing any real service, called before the medical officers of the Navy Department and found to be physically disqualified for service and almost immediately discharged from the service.

I understand that the physical disqualification above referred to was not incurred in the service. You further refer to a ruling of the Navy Department by the Chief of the Bureau of Navigation, to the following effect:—

Status of men enrolled in the Naval Reserve Force and found physically unqualified upon assignment to active duty.

1. If the men were enrolled in the Reserve Force and were called to active duty they were in active service during the war even if their active service was only for a period of one day.

1. MILITARY AID TO SUCH EX-SERVICE MEN.

Gen. St. 1919, c. 290, § 9, provides as follows:—

The recipient of military aid shall belong to and have the qualifications of one of the four following classes:—

First Class.

Each person of the first class shall have his settlement in the city or town aiding him: shall have served as a soldier, sailor, marine, nurse, or commissioned officer in the manner and under the limitations prescribed in the first class of section three; shall have been honorably discharged or released from active duty in such United States service and from all appointments and enlistments therein; shall be poor and indigent and, by reason of sickness or other physical disability, in such need as would entitle him to relief under the pauper laws; shall not be, directly or indirectly, in receipt of any other state or military aid, or of any pension for services rendered or disabilities incurred either in the Civil or Spanish wars, Mexican border service or German war service. The disability must have arisen from causes independent of his military or naval service aforesaid.

Second Class.

Each person of the second class shall have his settlement in the city or town aiding him, and shall be an invalid pensioner, entitled to receive state aid, whose income from pension or government compensation and state aid is inadequate for his relief, and who would otherwise receive relief under the pauper laws.

Third Class.

Each person of the third class shall have all the qualifications of persons of the first class except settlement, and shall have been a continuous resident of this commonwealth during the three years last preceding his receipt of military aid, and he or she shall be a resident of the city or town granting the aid.

Fourth Class.

Each person of the fourth class shall have all the qualifications of persons of the second class except settlement, and shall have been a continuous resident of this commonwealth during the three years last preceding his or her receipt of military aid, and shall be a resident of the city or town granting aid.

A. *First and Third Classes.* — Since each person of the third class “shall have all the qualifications of persons of the first class except settlement,” I am of opinion that both classes may be considered together in respect of your inquiry.

There can be no question that a man enrolled in the United States Naval Reserve Force, who is called for active duty but who is almost immediately discharged from the service because physically disqualified therefor, is “honorably discharged,” within the meaning of the statute. I further assume, without deciding, that, in view of the ruling of the Navy Department, such a man was “discharged or released from active duty in such United States service,” within the meaning of the act. The question, therefore, is whether such a man is not entitled to military aid because such physical disqualification was not incurred in the service.

Section 9, above quoted, requires that “each person of the first class . . . shall have served as a . . . sailor . . . in the manner and under the limitations prescribed in the first class of section three.”

Section 3 contains the following requirements for membership in the first class in respect of the late war:—

The recipient of state aid shall have a residence, and shall actually reside, in the city or town from which such aid is received, shall not receive aid from any other city or town in the commonwealth or from any other state, shall be in such needy circumstances as to require public assistance, and, if a soldier, sailor or nurse, shall have been honorably discharged from all appointments and enlistment in the army or navy, shall be so far disabled, as the result of his service in the army or navy, as to prevent him from following his usual occupation, and shall belong to one of the following classes:—

First Class.

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Any soldier, sailor, or nurse who served in the army or navy of the United States in the war with Germany, which for the purposes of this chapter shall be defined as having begun on the third day of February, nineteen hundred and seventeen, and as having ended on the eleventh day of November in the year nineteen hundred and eighteen: *provided*, that such soldier, sailor, or nurse, receives a pension or compensation from the United States government for disability incurred in such service, and was mustered into such service while an inhabitant of a city or town in the commonwealth and actually residing therein; and *provided, further*, that such soldier, sailor, or nurse was honorably discharged from such service by reason of illness or disability incurred therein.

It will be observed that these requirements contain the express proviso: "*provided, further*, that such . . . sailor . . . was honorably discharged from such service by reason of illness or disability incurred therein."

I am of opinion that, in view of the express incorporation of the "limitations" of section 3 into section 9, this proviso of section 3 governs. It follows that a man officially enrolled in the United States Naval Reserve Force, who is called for active duty but almost immediately discharged from the service by reason of illness or disability *not* incurred therein, is *not* entitled to military aid in either the first or third classes defined by section 9 of chapter 290 of the General Acts of 1919.

B. *Second and Fourth Classes.*—Since each person of the fourth class "shall have all the qualifications of persons of

the second class except settlement," I am of opinion that both classes may be considered together with respect to your inquiry. Each member of these two classes must be "an invalid pensioner entitled to receive state aid." I am of opinion that this requirement confines the right to receive military aid to those persons who would be entitled to State aid under the provisions of section 3. It follows that the conclusion already reached as to the first and third classes applies equally to the second and fourth classes.

2. STATE AID TO DEPENDENTS OF SUCH EX-SERVICE MEN.

The persons entitled to receive State aid as dependents are defined in the second, third and fourth classes of section 3.

A. *Second Class.* — The provisions of section 3 applicable to this war are as follows: —

Dependent relatives of invalid pensioners and of soldiers or sailors who served in the manner and under the limitations described for such service under class one who did not die in the service above defined and who were honorably discharged therefrom, as follows:

.

The dependent widow, dependent widowed mother and dependent children up to the age of sixteen of any soldier, sailor, or nurse who died while in such service during the German war as defined in class one, or who shall die after an honorable discharge from such service from injuries received or disabilities or illness incurred therein, or any child dependent by reason of physical or mental incapacity; *provided*, that the children were in being prior to his or her discharge or prior to the termination of said war as herein defined, or any person who stood to him or her in the relationship of a parent for five years prior to such service.

B. *Third Class.* — The third class is defined as follows: —

Dependent wives, and children up to sixteen years of age, widows and widowed mothers of soldiers, sailors, and nurses, entitled to state aid as defined in class one of this section, who appear on the rolls of their regiments or companies in the office of the adjutant general to be missing or to have been captured by the enemy, and who were not exchanged and have not returned from captivity, and whom the city or town officers granting such aid have good reason to believe to be dead.

C. *Fourth Class.* — The provision of section 3 applicable to this war is as follows: —

Fathers or mothers, the fathers being living, of soldiers or sailors who served in the German war, in the same manner and under the same limitations described herein for the service of said soldiers or sailors, and who died in such service, if such parents had been in receipt of state war allowance between February third nineteen hundred and seventeen and November eleventh nineteen hundred and eighteen.

It will be noted that membership in the second class is confined to the prescribed dependents of a man who either died in the service or who died after an honorable discharge from such service "from illness or disability incurred therein." Membership in the fourth class is confined to the prescribed dependents of men "who died in such service." The provisions as to membership in the third class manifestly do not apply. I am therefore of opinion that dependents of a man enrolled in the United States Naval Reserve Force, who is summoned for active duty but is almost immediately discharged by reason of illness or disability *not* incurred in the service, are *not* within the provisions of section 3 and are not entitled to State aid thereunder.

Yours very truly,

J. WESTON ALLEN, *Attorney-General.*

Emergency Fund — Transfer therefrom to meet Deficiency in Appropriation — Recommendation by Auditor as Condition Precedent to transfer by Governor and Council.

Under R. L., c. 4, § 9, as amended by St. 1908, c. 549, § 1, a request for a transfer from the emergency fund, in order to meet a deficiency in an appropriation, must be recommended by the Auditor before the same can be approved by the Governor and Council.

FEB. 4, 1920.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — I have received from the executive secretary a letter addressed to Your Excellency and the Honorable Council by the secretary of the Soldiers' and Sailors' Commission, and an informal request for an opinion in regard to the authority vested in Your Excellency and the Honorable Council to take the action requested in the letter.

The letter states that on Sept. 3, 1919, Your Excellency

and the Honorable Council appropriated the sum of \$5,000 for the use of the Soldiers' and Sailors' Commission, but that the amount was never transferred to the account of the commission. The letter further states that the amount is needed in order that the commission may properly carry on its work, and requests that such action be taken as will make this amount previously voted available for the use of the commission.

Upon the facts stated, the question presented would appear to be whether Your Excellency and the Honorable Council can by any action at this time make available for the use of the commission the sum of \$5,000, the use of which was authorized by the vote of Sept. 3, 1919.

Upon inquiry I am advised by the Auditor that of the amount of \$100,000 appropriated for extraordinary expenses last year, pursuant to St. 1908, c. 549, a balance of \$467.60 remains unexpended. It is obvious, therefore, that no action which can now be taken would make available for the use of the commission the amount the use of which was authorized by the vote of last year.

The amount authorized by the vote of Sept. 3, 1919, being no longer available, a further question is presented as to whether the commission may properly request Your Excellency and the Honorable Council to authorize the use of the amount desired from the amount to be appropriated for extraordinary expenses during the current year.

This raises the inquiry whether any occasion is presented at this time which would justify the use of any part of the emergency fund for the expenses of the commission. The commission was created by Spec. St. 1919, c. 112, and by the provisions of that act received an appropriation of \$10,000. The General Court is now in session, and any request for funds to carry on the work of the commission during the current year would properly be addressed to the General Court in the first instance. I find in the cases in which the opinion of the Attorney-General has previously been requested no instance in which requests have been made to Your Excellency and the Honorable Council for a payment out of the emergency fund when the General Court was in session.

The question of what constitutes such an emergency as was contemplated by the General Court at the time of the

passage of St. 1890, c. 415, by the terms of which the emergency fund was originally created, has been presented for consideration and discussed in previous opinions of the Attorneys-General. The original act, as incorporated in R.L., c. 4, § 9, is as follows: —

An amount not exceeding twenty thousand dollars shall be appropriated each year for carrying out the provisions of sections one hundred and twenty to one hundred and twenty-seven, inclusive, of chapter sixteen, for the entertainment of the president of the United States and other distinguished guests while visiting or passing through this commonwealth and for extraordinary expenses, not otherwise provided for, which the governor and council may deem necessary.

Under this act the question was presented whether an amount due the State printer for printing the journal of the Senate and the journal of the House might properly be paid from the appropriation for extraordinary expenses when appropriations by the General Court for the purpose had proved inadequate, and the General Court was no longer in session. In the opinion of Hon. Herbert Parker to His Excellency John L. Bates, advising that it was for the Governor and Council, in the large discretion conferred upon them by the act, to determine whether the faith and the interests of the Commonwealth rendered such payment necessary, he said: —

I am constrained to add, however, that such action is to be justified only if the Governor and Council deem it to be required by an exigency growing out of a particular condition of facts imperatively demanding immediate payment on grounds of good faith or of the interests of the Commonwealth, and no precedent should be established under which the fund in question may be held available for meeting deficiencies in general appropriations, for such is not its legitimate purpose.

In a later opinion, rendered on Dec. 22, 1903, by Hon. Herbert Parker to His Honor Curtis Guild, Jr., the Attorney-General said: —

I had the honor to advise His Excellency the Governor heretofore, in an opinion under date of Nov. 12, 1903, that in my opinion the Legislature did not intend that the fund set apart for extraordinary expenses should be used to defray any expense incurred in the usual course of events, and for which an appropriation is regularly set apart —

and, in concluding, again emphasized the fact that the appropriation for extraordinary expenses should be rigidly confined to the purposes which were within the contemplation of the General Court at the time the act was passed. In this connection he said:—

But, since there does exist an appropriation to which these expenses might otherwise be charged, I should be evading the responsibility which I think Your Honor's inquiry puts upon me, if I did not further say, substantially as I have heretofore said to His Excellency the Governor, that the appropriation for extraordinary expenses should be held rigidly for the purposes for which the Legislature intended it, and any draught upon it can be justified only by the express provisions of the law, or by the responsible exercise of that discretion of the Council to which the Legislature confided the fund.

The specific provision for the use of this appropriation to meet deficiencies in appropriations made by the General Court was first made in an amendment to R. L., c. 4, § 9, being St. 1908, c. 549, § 1. The statute as then amended has not since been changed, and is as follows:—

An amount not exceeding one hundred thousand dollars shall be appropriated each year for carrying out the provisions of sections one hundred and twenty to one hundred and twenty-seven, inclusive, of chapter sixteen, for the entertainment of the president of the United States and other distinguished guests while visiting or passing through this commonwealth, for extraordinary expenses, not otherwise provided for, which the governor and council may deem necessary, and, upon the recommendation of the auditor with the approval of the governor and council, to make transfers to such appropriations as have proved insufficient.

The clear intent of the statute, as amended, is to require the recommendation of the Auditor as a condition precedent for favorable action by the Governor and Council upon any transfer from the appropriation for extraordinary expenses to meet a deficiency in any other appropriation. The statute contemplates that before exercising the large discretion vested in the Governor and Council in determining what are extraordinary expenses, within the purpose and intent of the act, they shall have the approval of the Auditor, based upon the full information with respect to previous appropriations and expenditures which is available to his department. As the

recommendation of the Auditor is made a condition precedent to approval of a transfer from the fund appropriated for extraordinary expenses, it follows that until such recommendation has been made any request for a transfer of funds from the appropriation for extraordinary expenses to the use of the Soldiers' and Sailors' Commission for the purposes stated cannot properly be addressed to Your Excellency and the Honorable Council. See *Opinion of the Justices*, 13 Allen, 593.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Public Office — Commissioner to qualify Civil Officers — Woman.

Under R. L., c. 17, § 8, and the Constitution of the Commonwealth a woman may not be appointed as commissioner to qualify civil officers.

FEB. 10, 1920.

HIS EXCELLENCY CALVIN COOLIDGE, *Governor of the Commonwealth*.

SIR: — You inquire whether, under R. L., c. 17, § 8, a woman may legally be appointed to the office of commissioner to qualify civil officers.

Mass. Const., pt. 2nd, c. VI, art. I, requires "any person appointed or commissioned to any judicial, executive, military, or other office under the government" to take and subscribe the oath prescribed by Mass. Const. Amend. VI "before such persons and in such manner as from time to time shall be prescribed by the legislature." By Res. 1780, October Session, c. 58, the Legislature provided: —

Resolved, That the Governor, Lieutenant-Governor, or any two of the Council, or any other person or persons especially appointed by the Governor and Council, be, and they hereby are empowered, to administer the oaths or affirmations required by the constitution of this Commonwealth to all officers commissioned under the said constitution or form of government, until further provision shall be made by the General Court of the Commonwealth aforesaid.

The provision of this resolution for the appointment of commissioners to administer such oaths has been continued through Rev. Stats., c. 13, § 57, Gen. Stats., c. 14, § 40, Pub.

Stats., c. 18, § 7, to R. L., c. 17, § 8, which provides as follows: —

The governor, with the advice and consent of the council, shall appoint commissioners to administer to public officers the oaths of office required by the constitution. Such commissioners shall, upon administering such oaths, forthwith make return thereof, with the date of the same, to the secretary of the commonwealth.

These commissioners perform a function prescribed by the Constitution. It is of so high and important a character that, under Res. 1780, c. 58, it might be discharged by the Governor, Lieutenant-Governor or “any two” of the Council. This provision clearly indicates that women were not intended by the Legislature to be included in the “persons” who might be appointed as commissioners under that resolution. Indeed, it may be doubted whether the word “persons,” as used in Mass. Const., pt. 2nd, c. VI, art. I, was intended to include women. See *Opinion of the Justices*, 107 Mass. 604; *Opinion of the Justices*, 150 Mass. 586; *Opinion of the Justices*, 165 Mass. 599. Moreover, there is no indication that the Legislature, in continuing and re-enacting the provisions of Res. 1780, c. 58, for the appointment of commissioners, intended, even if it had the power, to broaden the scope of that resolution so as to permit the appointment of women. Both the constitutional and legislative history of R. L., c. 17, § 8, strongly indicate that women are not eligible.

The authorities point to the same result. A woman has been held ineligible to appointment as a justice of the peace, *Opinion of the Justices*, 107 Mass. 604; or as a notary public, *Opinion of the Justices*, 150 Mass. 586, *Opinion of the Justices*, 165 Mass. 599; or to the office of truant officer under R. L., c. 46, § 12, III Op. Atty.-Gen. 444; or to the office of deputy collector of taxes, opinion of former Attorney-General Dana Malone to the Committee on Taxation, dated Feb. 27, 1908. It has also been held that, under St. 1876, c. 197, a woman could not be examined for admission to the bar, *Robinson's Case*, 131 Mass. 376, though this was later changed by St. 1882, c. 139. So, also, she cannot participate in a party caucus, II Op. Atty.-Gen. 469, or be a town treasurer, Attorney-General's Report, 1919, p. 86. Indeed, it has been held that the Legislature had no constitutional power to authorize the appointment of women as notaries public under

Mass. Const. Amend. IV, *Opinion of the Justices*, 165 Mass. 599, though women are now made eligible by Amend. LVII. So, also, the Legislature has no constitutional power to provide that the persons entitled to vote on the ratification or rejection of constitutional amendments shall include women. *Opinion of the Justices*, 226 Mass. 607.

On the other hand, it has been held that the Constitution, which is wholly silent on the subject, does not exclude women from a school committee. *Opinion of the Justices*, 115 Mass. 602. And a provision for the appointment of "nine persons who shall constitute a state board of health, lunacy and charity" has been held to authorize the appointment of a woman where other parts of the act and prior legislation indicated that such was the intent of the Legislature. *Opinion of the Justices*, 136 Mass. 578. Thus, when the Legislature has intended that women should be eligible, it has usually made express provision therefor (*Robinson's Case*, 131 Mass. 376, 379, 381), as in R. L., c. 17, § 5. The omission of any such provision from R. L., c. 17, § 8, is a further indication of the legislative intent that women should not be eligible.

I am therefore constrained to advise you that women are not eligible to appointment under R. L., c. 17, § 8.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Animals — Killing of Wild Birds and Animals on State Reservations — Power of Commissioner of Conservation to license.

Under St. 1909, c. 362, § 1, the Commissioner of Conservation cannot authorize, within any State reservation under his jurisdiction, the hunting, taking or killing, during the open season, of any birds or animals which were protected by law at the time when that act took effect.

FEB. 12, 1920.

HON. WILLIAM A. L. BAZELEY, *State Forester, Department of Conservation.*

DEAR SIR:— You inquire whether the Commissioner of Conservation may lawfully authorize, during the open season, the hunting and killing of wild birds or animals on a State reservation under his jurisdiction, if such birds or animals were, on June 6, 1909, protected by law during a part of the year.

St. 1909, c. 362, entitled "An Act to provide for the establishment of refuges for birds and game," reads, in part, as follows: —

SECTION 1. No person shall hunt, pursue, take, kill or in any manner molest or destroy any wild bird or game within the exterior boundaries of any state reservation, park, common or any land held in trust for public use, except that the authorities or persons having the control and charge of such reservations, parks, commons or other lands may in their discretion, and with such limitations as they may deem advisable, authorize persons to hunt, take or kill within said boundaries any wild birds or animals which are not now protected by law. . . .

The words "not now protected by law" would seem to make the exception in said section apply only to such birds and animals having no protection whatever. The use of the word "now" is significant. Without it, it might well be argued that hunting could be licensed during an open season, but by its use it indicates an intention to prohibit the killing of any birds and game which receive protection under the laws of the Commonwealth. This construction is supported by the title of the act, which declares State reservations to be refuges for certain birds and animals. Prior to its passage, it would have been unlawful to hunt protected birds and animals during the close season on State land as well as on private property; and if the act were held to permit the killing of certain birds and animals on a State reservation during the open season, such reservations would not be refuges.

I therefore advise you that only such birds and animals as were entirely unprotected by law on June 6, 1909, when the statute took effect, may lawfully be killed under a license of the persons having charge of State reservations.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Maximum Prison Sentence — Date of Expiration.

A maximum sentence to prison for five years from June 15, 1916, expires at midnight on June 14, 1921.

FEB. 17, 1920.

HON. SANFORD BATES, *Commissioner of Correction*.

DEAR SIR: — You have requested my opinion as to whether the maximum sentence to prison for five years from June 15, 1916, expires on June 14 or June 15, 1921.

In computing time the law does not recognize a fraction of a day. Each day being in contemplation of law indivisible, it has become a recognized rule, and it has been so held in this Commonwealth, that a person attains the age of majority on the day preceding the twenty-first anniversary of his birth. The *terminus a quo* is the day of his birth. *Bardwell v. Purrington*, 107 Mass. 419.

The term of sentence of a prisoner begins when his sentence has been imposed by the court. From that time he is in confinement, although he may not be removed to the place where he is to serve his sentence until the next day or even a later date. A sudden illness or other sufficient reason might prevent his removal, but, in contemplation of law, he begins to serve his sentence from the time when the sentence is imposed.

It follows, from the foregoing, that if a prisoner served a maximum sentence of five years imposed on June 15, 1916, the sentence would expire at midnight on June 14, 1921.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Fourteenth Amendment — State Constitution — Power to fix Charge of Employment Agency.

A proposed bill which fixes the maximum charge which may be exacted by an employment agency from an applicant for a position in the public schools would violate the Fourteenth Amendment to the Federal Constitution and also those provisions of the State Constitution which guarantee life, liberty and property to the same extent as does the Fourteenth Amendment.

FEB. 20, 1920.

Joint Committee on Education.

GENTLEMEN: — You inquire whether House Bill No. 431, relative to the fees that may be charged for obtaining positions for school teachers, would, if enacted, be constitutional. The bill amends St. 1911, c. 731, § 2, by providing that “no person, firm, corporation, or association shall demand or accept from any applicant for the position of a teacher in the public schools” a fee exceeding \$2, or shall charge, if a position be obtained for the applicant, a sum exceeding 3 per cent of the salary of the teacher for the first year. St. 1911, c. 731, § 4, provides that any violation of the act shall be

punished by a fine of not less than \$50 nor more than \$500. The fundamental question raised by this bill is whether the Legislature has power to fix the maximum fee to be charged by an employment agency to an applicant for its service.

The Fourteenth Amendment to the Federal Constitution provides: “. . . nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Mass. Const., pt. 1st, art. I, provides: —

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

See also articles X, XII and XXIX of the Declaration of Rights.

It has been held that these provisions of the Massachusetts Constitution guarantee “life, liberty and property” to the same extent as does the Fourteenth Amendment. *Opinion of the Justices*, 220 Mass. 627, 630; *Wyeth v. Cambridge*, 200 Mass. 474, 478. It will not, therefore, be necessary to consider the two constitutions separately. Each independently guarantees a right to “life, liberty and property,” and each correspondingly limits the power of the Legislature.

The extent to which the Legislature may regulate a lawful business without infringing the constitutional right to liberty and property is affected by the relation of the business to the public. If the business be affected with a public use, the Legislature may require those who engage in it to serve the public for a reasonable price. *Munn v. Illinois*, 94 U. S. 113; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. Railroads, telephone and telegraph companies, gas and electric light companies and many others are familiar examples of businesses affected with a public use, whose charges may be thus regulated. In all these cases the service has become important, or even essential to the public. The company has generally attained such a dominating position that competition is not a sufficient safeguard against overcharge and discrimination. Economically the citizen stands at such disadvantage that if the matter be left to private bargain he

must take the service upon the terms imposed by the company. Under such circumstances, one who professes to render the service to the public indiscriminately has no constitutional right to prescribe at pleasure what the public must pay. The business has, in fact, become affected with a public use, and is subject to regulation accordingly. *Munn v. Illinois*, 94 U. S. 113; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. The Legislature cannot, it is true, require the service to be given for less than a fair and reasonable return. *Denver v. Denver Union Water Co.*, 246 U. S. 178. But in the case of public service companies the right to prescribe a reasonable rate is unquestioned.

The constitutional distinction between a business affected with a public use and private transactions between man and man is fundamental. It is true that changing conditions may carry a business originally private across the line into the classes of service which are deemed to be public. *Munn v. Illinois*, 94 U. S. 113; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. But until that occurs, a private business is entitled to the full measure of protection guaranteed by the Constitution to private persons.

Thus the "liberty" guaranteed by each Constitution to private individuals embraces the right to follow any lawful private calling and to enter into all lawful contracts to that end, but subject, nevertheless, to a reasonable measure of regulation for the common welfare. *Allgeyer v. Louisiana*, 165 U. S. 578, 589; *Lochner v. New York*, 198 U. S. 45, 53; *Adair v. United States*, 208 U. S. 161; *Brazee v. Michigan*, 241 U. S. 340; *Adams v. Tanner*, 244 U. S. 590, 595; *Coppage v. Kansas*, 236 U. S. 1, 14; *Commonwealth v. Perry*, 155 Mass. 117, 121; *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206, 208; *Opinion of the Justices*, 220 Mass. 627, 630. The principle is thus stated in *Opinion of the Justices*, 220 Mass. 627, 630: —

It was said in *Coppage v. Kansas*, 236 U. S. 1, at page 14: "Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

Moreover, labor or service is "property," within the meaning of the Constitution, and is entitled to protection as property. *Bogni v. Perotti*, 224 Mass. 152, 155; *Adair v. United States*, 208 U. S. 161, 173-175; *Coppage v. Kansas*, 236 U. S. 1, 10. The principle is thus stated in *Bogni v. Perotti*, 224 Mass. 152, 154: —

That the right to work is property cannot be regarded longer an open question. It was held in *Cornellier v. Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, at page 560, that "The right to labor and to its protection from unlawful interference is a constitutional as well as a common law right." It was said in *State v. Stewart*, 59 Vt. 273, 289, "The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property." In the *Slaughter-House Cases*, 16 Wall. 36, 127, in the dissenting opinion of Mr. Justice Swayne, but respecting a subject as to which there was no controversy, occur these words: "Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty." It was settled that the right to labor and to make contracts to work is a property right by *Adair v. United States*, 208 U. S. 161, 173-175, and *Coppage v. Kansas*, 236 U. S. 1, 10. Controversy on that subject before this court must be regarded as put at rest by these decisions. The right to work, therefore, is property. One cannot be deprived of it by simple mandate of the Legislature. It is protected by the Fourteenth Amendment to the Constitution of the United States and by numerous guaranties of our Constitution. It is as much property as the more obvious forms of goods and merchandise, stocks and bonds.

The business of an employment agency is a lawful private calling. *Adams v. Tanner*, 244 U. S. 590, 593; *Ex parte Dickey*, 144 Cal. 234, 236; *Spokane v. Macho*, 51 Wash. 322, 324. As was said in *Adams v. Tanner*, 244 U. S. 590, 593: —

But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living.

Like other lawful private callings, the business of employment agencies is subject to a reasonable measure of regulation for the common welfare. *Brazee v. Michigan*, 241 U. S. 340. It is competent for the Legislature to require that such agencies be licensed and to forbid sending applicants to an employer who has not applied for labor. *Brazee v. Michigan*,

241 U. S. 340. But in essence the business is merely a purchase and sale of private personal service. From a constitutional standpoint the transaction does not differ from a sale of service by a professional man or a laborer. It is entitled to the same measure of constitutional protection. As the contract is incident to, and, indeed, the very essence of, the exercise of a lawful calling, the making of that contract is within the constitutional guarantee of "liberty." Since the contract involves a sale and purchase of service, which is property, it is within that measure of protection which the Constitution extends to property, whether tangible or intangible. It is beyond the power of the Legislature either to abolish the business or to require that the service be rendered without charge to "workers," even though the agency is left free to exact a fee from the employer for the service rendered to him. *Adams v. Tanner*, 244 U. S. 590.

The Legislature may to some extent regulate even contracts between man and man for a sale of labor or service in order to protect the safety, health and morals of the public. If the employment be dangerous, like mining, it may prescribe reasonable hours of service. *Holden v. Hardy*, 169 U. S. 366, 373. On the other hand, a statute which prohibits males of full age to labor for more than ten hours a day in an ordinarily healthful occupation is an unlawful interference with the constitutional right of both employers and employed to contract for the sale of labor on such terms as they deem best. *Lochner v. New York*, 198 U. S. 45; *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206; but see *Bunting v. Oregon*, 243 U. S. 426. So, also, a statute which forbids an employer to require the employee, as a condition of employment, to refrain from membership in a labor union, is in violation of the constitutional right to sell and purchase labor. *Adair v. United States*, 208 U. S. 161; *Coppage v. Kansas*, 236 U. S. 1. On the other hand, a statute which provides that the basic day in a mill or factory shall be ten hours, with a proviso that employees may work overtime not more than three hours in any one day if they receive time and a half, the regular wage for such overtime, has been upheld as a reasonable health regulation in view of the nature of the work, the provision for additional overtime pay being construed, not as a regulation of wages, but as a deterrent upon the use by the employer of the overtime privilege. *Bunting v. Oregon*, 243

U. S. 426; see also *Wilson v. New*, 243 U. S. 332. It is true that changed conditions and perhaps fuller knowledge of what public welfare requires may render reasonable and proper a regulation which, on a different state of facts, would have been beyond the power of the Legislature. This creates the illusion of a growing legislative power, which constantly tends to eat away constitutional guaranties. Such is not the case. The extent of the power and the scope of the guaranties remains unaltered. It is merely that a change in the conditions upon which both the power and the guarantee operate may bring within the scope of legislative power what was not formerly within it, just as changed conditions may affect with a public use a business which formerly was private. The constitutional rule remains unchanged that, unless the safety, health or morals of the public are reasonably involved, the Legislature has no power to prescribe the conditions under which labor or private service shall be bought and sold by men of full age. *Adair v. United States*, 208 U. S. 161; *Coppage v. Kansas*, 236 U. S. 1; *Lochner v. New York*, 198 U. S. 45; *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206.

To prescribe the maximum price at which a private individual shall sell his labor or service manifestly has a less direct relation to the safety, health or morals of the public than a regulation of the hours which he may work. The Supreme Judicial Court leaves it doubtful whether a compulsory minimum wage law, even for women, would be valid (see *Holcombe v. Creamer*, 231 Mass. 99), although statutes which reasonably regulate the hours of labor of women and minors are upheld for reasons of health. *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *Commonwealth v. Riley*, 210 Mass. 387, affirmed 232 U. S. 671. Be that as it may, no question either of health or hours of labor is involved in the present case. The service of an employment agency is not measured by time. The price to be charged depends primarily upon the views of the contracting parties as to its value. Such a sale differs in no essential respect from a sale of a house or of a sack of potatoes. If the Legislature could regulate the price of that intangible property known as private labor or private service, it might equally fix the price of every commodity of daily life from a shoestring to a mansion. To hold that it possesses this power would in effect

abolish the settled constitutional distinction between private business and a business affected with a public use.

In *Commonwealth v. Perry*, 155 Mass. 117, a statute which in effect required manufacturers to agree to pay the same wage for good and for imperfect weaving was held to infringe the liberty of contract guaranteed by the Constitution. In II Op. Atty.-Gen., 264, 266, Hon. Hosea M. Knowlton, in advising that a statute which required counties, cities and towns to pay more than the prevailing rate of wages to those employed upon public work was unconstitutional (see also *in accord*, *Street v. Varney Electrical Supply Co.*, 160 Ind. 338; *People v. Coler*, 166 N. Y. 1; *contra*, *Malette v. Spokane*, 77 Wash. 205), said:—

It would scarcely be disputed, I apprehend, that a law containing such provisions, affecting private individuals and corporations, would be a violation of the liberties and privileges of citizens under the Declaration of Rights of the Massachusetts Constitution and under the Fourteenth Amendment to the Federal Constitution. In the exercise of the police power conferred by the Constitution, many laws limiting the rights of citizens in the making of contracts, and even prohibiting certain contracts, have been enacted by the General Court and sustained as constitutional by the Supreme Judicial Court. *Opinion of Justices*, 163 Mass. 589. But, so far as I am aware, since the beginning of constitutional government no attempt has been made to fix by legislation an arbitrary price of any commodity, including labor, that may properly be the subject of contract between parties. It may well be assumed that any such interference with the rights of individuals and private corporations would be pronounced to be beyond the scope of legislative power.

It is true that the Legislature has a special contractual authority to regulate the manner in which contractors engaged upon public work for the State shall deal with the laborers employed in performing it (see *Atkin v. Kansas*, 191 U. S. 207; *Heim v. McCall*, 239 U. S. 175; *Lee v. Lynn*, 223 Mass. 109; *Woods v. Woburn*, 220 Mass. 416) which it does not possess in the case of a purely private sale and purchase of labor. *Lochner v. New York*, 198 U. S. 45; *Truax v. Raich*, 239 U. S. 33, 43. But this contractual authority does not reach to the present case. The employment agency does not contract with the State in respect of applicants for the position of teacher in the public schools. The transaction is a purely private contract between private persons for a sale and purchase of private service. It has been squarely held that the State has no power to prescribe the compensation which an

employment agency shall exact from applicants for its service. *Ex parte Dickey*, 144 Cal. 234. The conclusion reached by this decision seems to follow inevitably from the authorities already considered. I am therefore of opinion that House Bill No. 431 would, if enacted, infringe upon both the liberty of contract and the right to private property guaranteed by both the Massachusetts Constitution and the Fourteenth Amendment.

There is a further constitutional objection which might well be urged against the present bill. It purports to regulate the charges to be made by the agency only in the case of applicants for the position of teacher in the public schools. It therefore makes a special regulation applicable only to the persons who serve such applicants. Such a classification may well be so arbitrary as to deny to those within it the equal protection of the laws. See *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206, 208; *Bogni v. Perotti*, 224 Mass. 152, 156.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — “Borrowed Money” — Proceeds of Dry Dock built in Part by Outstanding Bonds.

Where the cost of a public work is in part defrayed by bonds issued by the Commonwealth, and while part of the bonds so issued are outstanding such public work is sold, so much of the purchase price as represents property paid for by the proceeds of the bonds so issued and outstanding is still “borrowed money,” within the meaning of Mass. Const. Amend. LXII, § 4, and must be used either for the purpose for which such bonds were issued or to repay the loan.

The extent to which the \$3,107,366.93, received as the purchase price of the Boston Dry Dock, is the proceeds of outstanding bonds issued under St. 1911, c. 748, § 17, examined and determined.

That part of the purchase price of the Boston Dry Dock which is the proceeds of outstanding bonds issued under St. 1911, c. 748, § 17, and therefore borrowed money, which under Mass. Const. Amend. LXII, § 4, is being held to repay such bonds at maturity, may lawfully be invested in other bonds of the Commonwealth which fall due prior to the due date of the bonds to be repaid.

MARCH 1, 1920.

Joint Committee on Ways and Means.

GENTLEMEN:— You inquire whether and to what extent the \$3,107,366.93 which will be received from the Federal government as the purchase price of the Boston Dry Dock

may legally be considered a receipt into the general fund of the Commonwealth, and so be available to meet current appropriations made by the General Court.

I have received from various departments the following information in regard to this dry dock. It cost \$3,107,366.93, which is the price at which it is sold to the United States. Of this amount \$778,805.34 came from available funds in the treasury of the Commonwealth, and the balance, namely, \$2,328,561.59, was paid out of the \$9,000,000 issue of bonds authorized by St. 1911, c. 748, § 17. Of that issue \$1,300,000 has been repaid out of general funds, leaving \$7,700,000 of bonds still outstanding. It is clear, therefore, that a certain proportion of the price received from the United States is the proceeds of bonds which are still outstanding and unpaid.

Amendment LXII, § 4, of the Constitution provides as follows:—

Borrowed money shall not be expended for any other purpose than that for which it was borrowed or for the reduction or discharge of the principal of the loan.

It is a well-recognized principle of sound finance that capital, and especially borrowed capital, should not be used for current expenses. The amendment, in my opinion, adopts this principle. It limits the purposes for which borrowed money may be used. Such money may not be used save for the purpose for which it was borrowed or to repay the loan. Clearly, if a million dollars of the amount received for the port development bonds issued under St. 1911, c. 748, § 17, were still in the treasury, that money could not be used for current expenses. Over \$2,000,000 of money received for port development bonds has gone into this dry dock. The sale of the dry dock turns it back into money. That money is as clearly the proceeds of the loan as any unexpended balance of the loan which may be still in the treasury. In my opinion, it is borrowed money still, within the meaning of the constitutional amendment. Were it otherwise, borrowed money could be relieved from the constitutional purpose impressed upon it by simply turning it into property and then back again into money by a sale of the property. I cannot believe that the salutary restriction imposed by the amendment is so easily satisfied. I am therefore of opinion that in so far as the money received for the sale of the dry dock

is the proceeds of bonds still outstanding and unpaid, it must be used either for the purpose for which the bonds were issued or to repay the loan.

The first question is as to the amount of those proceeds which were derived from the outstanding bonds which are still unpaid. It appears that \$2,328,561.59, or about one-quarter of the \$9,000,000 borrowed, went into the dry dock, but of this \$9,000,000 there has been paid the sum of \$1,300,000. The amount of bonds so paid which is fairly apportionable to the dry dock would, therefore, be represented by that fraction of \$1,300,000 which has as its numerator 2,328,561.59 and has as its denominator 9,000,000. This amount when computed is \$336,347.74. Add to this the \$778,805.34 which was paid out of available funds, and the amount of the proceeds of the dry dock subject to use for current expenses is \$1,115,153.08. If this sum be deducted from the \$3,107,366.93 which is received from the sale of the dry dock, we find that \$1,992,213.85 is the proceeds of the bonds still outstanding and unpaid. This amount, therefore, is still charged with the constitutional restriction, and may not be used save for the purposes for which the money was borrowed or to repay the loan.

The next question is as to the purpose for which the money was borrowed. The loan was authorized by St. 1911, c. 748, § 17, "to meet the expenses incurred under this act." That act provided for a comprehensive scheme for the development of the port of Boston. It is proposed to appropriate for such purposes this year the sum of \$600,000, to be taken from certain permanent funds established by statute. I see no legal reason why this amount may not be taken instead from the \$1,992,213.85 and an equivalent amount transferred to the general fund from the permanent port funds established by statute. It would require a special act to do this, but, as these special funds are the creature of statute and are not within Amendment LXII, they may be modified by statute. Another item which may lawfully be met out of the \$1,992,213.85 is the \$250,000 to be used to pay port development bonds which fall due this year. Add this to the \$600,000 and it makes a total of \$850,000, which, if deducted from the \$1,992,213.85, leaves \$1,142,213.85 still subject to the constitutional restriction.

The next question is as to how this \$1,142,213.85 shall be

held pending its use either to pay the port development loan or for purposes within the scope of St. 1911, c. 748. The principal of the port development loan falls due at the rate of \$250,000 each year. There are still \$7,700,000 outstanding, and \$250,000 mature each year, but as the bonds were issued at different times, for a term not exceeding forty years, the final maturity is not until 1957. There is nothing in the Constitution which requires that the \$1,142,213.85 shall either be held in the treasury or deposited in banks to await the time when it will be needed for the retirement of the loan. It is not only lawful but good business policy to invest it in proper securities which will yield a larger income return than bank deposits. It has been suggested that, in view of the heavy State tax to be anticipated this year, capital expenditure for highways be met by bonds instead of by current revenue. It is suggested further that \$1,000,000 be borrowed for this purpose. If the term of the bonds to be issued for this purpose be so fixed that the principal will fall due in time to retire the port development bonds, I see no reason why \$1,000,000 out of the \$1,142,213.85 may not be invested in those bonds. Such investment is not a diversion of the fund to highways, but simply a lawful investment of a special fund. The balance, or \$142,213.85, remains available for Boston port development or to be applied to the \$250,000 of port bonds which mature next year.

To summarize:—

Cost of dry dock,	\$3,107,366 93
Amount met from general funds, . . .	\$778,805 34
Amount of dry dock bonds paid from general funds,	336,347 74
Amount of proceeds of dock available for general purposes,	<u>1,115,153 08</u>
Balance of proceeds of dock paid out of \$9,000,000 loan,	\$1,992,213 85
Port development purposes this year, . .	\$600,000 00
Port development bonds payable this year,	<u>250,000 00</u>
Amount to be spent for purposes for which the money was borrowed, and so payable out of loan proceeds,	<u>\$50,000 00</u>
Amount still remaining in trust fund,	\$1,142,213 85

Appropriation for highways for current year to be bonded and bonds bought by Commonwealth out of trust fund,	\$1,000,000 00
Balance in trust fund,	\$142,213 85

In conclusion, I may suggest that the determination of the question submitted to me by your committee must depend ultimately upon the principles of sound finance rather than upon the legal principles involved. By that I mean that whether the Commonwealth has or has not the power under the Constitution to transfer money borrowed for the capital account to the income account and to use it for current expenses should not determine the course to be pursued by your committee. The General Court has power under the Constitution to raise the entire amount required for the expenses of the year by a bond issue, making any State tax unnecessary, and passing on to future taxpayers the burden of paying the budget for the current year. To use money received from the sale of the property of the Commonwealth, which property has not yet been paid for, is an indirect way of accomplishing the same result. If the principle of using the proceeds of the sale of the dry dock for current expenses is sound, a sale of the Commonwealth Pier to the Federal government for \$5,000,000, and of other property acquired by the port development loan, would make it possible to do away with the State tax altogether, or reduce it to an inconsiderable sum. The motive which has constrained the General Court to make provision for current expenses from current income is as cogent to prevent passing on the burden to future taxpayers indirectly by a sale of the property of the Commonwealth acquired with borrowed money as directly by means of a bond issue.

In the foregoing opinion I have suggested certain methods by which the proceeds of the sale of the dry dock may legally be expended and invested in such manner as to reduce the amount of the State tax for the current year below what would otherwise be required. In answer to inquiries made by members of the committee I have pointed out that \$600,000 of certain permanent port funds may legally be transferred to the general fund by appropriate legislation, and that the proceeds of the sale of the dry dock may be invested in bonds issued to provide for capital expenditure for highways.

In what I have said I would not be understood to recommend either the transfer of permanent funds to the general fund or the issue of bonds. I have endeavored only to suggest what methods may legally be pursued by your committee to avoid the serious constitutional question which would be raised by appropriation of the entire proceeds of the dry dock to current expenses.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Taxation — Discharge in Bankruptcy.

Taxpayers who have received their discharge from the Bankruptcy Court are liable for unpaid taxes, since they are not provable debts.

MARCH 4, 1920.

IRVING L. SHAW, Esq., *Income Tax Director, Department of Corporations and Taxation.*

DEAR SIR: — You have asked my opinion as to the proper procedure to collect unpaid taxes against taxpayers who have gone into bankruptcy, and whether you may proceed against such taxpayers after they have received a discharge from the Bankruptcy Court.

Section 17 of the Bankruptcy Act of 1898, as amended by the act of Feb. 5, 1903, provides, by section 17*a*, that “a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; . . .”

A tax, therefore, is not a provable debt, but section 64*a* of the act requires the court to order the trustee to pay all taxes “legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors.” This has been construed as placing on the trustee the obligation to pay the tax first of all, even ahead of other debts which have priority. But taxes are not provable debts, and need not be proved in the bankruptcy court, and it is the duty of the trustee to pay them whether they are proved or not.

Section 9*a* of the act provides that “a bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for con-

tempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of the duty imposed by this act." Since taxes are not provable debts, a bankrupt cannot be discharged from his taxes, and therefore neither while he is in bankruptcy nor after he is discharged is there any prohibition of his arrest for failure to pay taxes.

As a matter of policy, however, I think it unwise to arrest taxpayers prior to their discharge, or, at any rate, until you have had an opportunity, from the examination of their returns, to find out whether there are sufficient assets in the hands of the trustee to pay taxes, which are an obligation which must be met first of all. If you find that there are no assets, or assets entirely inadequate to meet your claim for taxes, and believe that arrest will result in payment of the tax, you are warranted in taking such procedure, having due regard to the necessary conditions which must be complied with in making an arrest.

Under the conditions stated, I see no reason why you should not have warrants issued against taxpayers who have received their discharge from bankruptcy and have not, in the meantime, either individually or through the trustee in bankruptcy, made payment.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Aliens — Right to possess Shotguns or Rifles.

The statute prohibiting certain aliens from possessing shotguns and rifles is a law for the protection of wild animals and birds; hence, fines received for violation thereof are to be divided equally between the Commonwealth and the county in which prosecution is made.

MARCH 5, 1920.

MR. THEODORE N. WADDELL, *Director of Accounts, Department of Corporations and Taxation.*

DEAR SIR: — You ask my opinion "as to whether a violation of the latter half of section 1 of chapter 240 of the

General Acts of 1915 (possession of firearms by an alien, with no apparent or proven intent to hunt) is to be construed as a violation of the game laws; and whether any fine imposed in such case is to be paid over in accordance with St. 1908, c. 330."

Gen. St. 1915, c. 240, § 1, reads, in part, as follows:—

It shall be unlawful for any unnaturalized foreign born resident, unless he owns real estate in this commonwealth to the value of not less than five hundred dollars, to hunt, capture or kill any wild bird or animal, either game or otherwise, of any description, excepting in defence of the person, and it shall be unlawful for any such unnaturalized, foreign born resident within this commonwealth to own or have in his possession or under his control a shotgun or rifle of any make.

The provisions of St. 1908, c. 330, direct that all fines, penalties and forfeitures recovered in prosecutions under the laws relative to fisheries or to birds, animals and game, with certain exceptions not here important, shall be divided equally between the county in which such prosecution is made and the Commonwealth, with a further proviso that if the prosecution is directed by a deputy, appointed by the Commissioners on Fisheries and Game and receiving compensation from the Commonwealth, all fines, penalties and forfeitures shall be paid into the treasury of the Commonwealth.

I assume that the reason for your inquiry is that in some cases the complaint filed with the court does not allege that the defendant alien was hunting or killing any wild game, but that such person owned or had in his possession or under his control a shotgun or rifle.

The object of the 1915 statute is described in its title as being, "An Act to provide further protection for wild birds and quadrupeds." Under section 3 of the same act it is provided that notice of the seizure of firearms shall be sent to the Commissioners on Fisheries and Game, and that such firearms shall be sold at the discretion of said commissioners. In section 4 the commissioners and their deputies are given authority to arrest without a warrant any such person with a shotgun or rifle in his possession. The act is essentially one of game protection. Were it otherwise there might be a doubt as to its constitutionality, by reason of the Four-

teenth Amendment to the Federal Constitution, which provides: —

. . . nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The constitutionality of an almost identical statute was raised in the case of *Commonwealth v. Patson*e, 231 Pa. St. 46, affirming 44 Pa. Superior Ct., 129. It was there held that the act

. . . defines two several and independent offences: first, the hunting of game by an alien; second, for an alien either to own or be possessed of a shotgun or rifle of any make. The primary subject of the act is the preservation of wild birds, animals and game, and under all our authorities the privilege of hunting and taking game is limited, under defined restrictions, to our own citizens. Since long-range firearms — shotguns and rifles — are generally used in killing wild birds and animals, it is clear that the Legislature, in prohibiting a foreign-born, unnaturalized resident from hunting game, intended to make the hunting of game by an alien the more difficult by taking away from such persons the means by which game is usually killed. This prohibition against having deadly and long-range firearms does not in any way deprive the alien of property without due process of law, but simply defines and limits his right to use firearms by restricting such right to the use of short-range firearms — revolvers and pistols — and such other weapons as may be necessary for defence of his person and property.

The decree in this case was affirmed in *Patson*e v. *Pennsylvania*, 232 U. S. 138.

It is my opinion, therefore, that inasmuch as the act in question has for its primary purpose the protection of wild animals and birds, any fines or forfeitures derived from the authority therein conferred should be paid over in accordance with the provisions of St. 1908, c. 330.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Civil Service — Female Veteran — Certification.

The word "veteran" as used in Gen. St. 1919, c. 150, § 1, includes women who possess the qualifications prescribed by that act.

Where a civil service list is certified in answer to a requisition calling for women, a woman who passes the appropriate civil service examination and who is a veteran, within the meaning of Gen. St. 1919, c. 150, § 1, is entitled to be certified ahead of women who are not veterans, even though the latter have obtained a higher percentage in the examination.

MARCH 9, 1920.

PAYSON DANA, Esq., *Commissioner of Civil Service.*

DEAR SIR: — In a recent letter you request my opinion on the following questions: —

1. Does the word "veteran," as defined in Gen. St. 1919, c. 150, § 1, include women?

2. If the answer to the first question is in the affirmative, under section 2 of that act are the names of women who are "veterans," and who pass the appropriate civil service examinations, to be placed "above the names of all other applicants," and in answer to a requisition calling especially for women are their names to be certified ahead of women who are not veterans but who have obtained a higher percentage in the examinations?

1. Gen. St. 1919, c. 150, § 1, provides as follows: —

The word "veteran" as used in this act shall mean any person who has served in the army, navy or marine corps of the United States in time of war or insurrection and who has been honorably discharged from such service or released from active duty therein, provided that such person was a citizen of this commonwealth at the time of his induction into such service or has since acquired a settlement therein; and provided further that any such person who at the time of entering the said service had declared his intention to become a subject or citizen of the United States and withdrew such intention under the provisions of the act of congress approved July ninth, nineteen hundred and eighteen, and any person designated as a conscientious objector upon his discharge shall not be deemed to be a "veteran" within the meaning of this act.

The Legislature has in this act used the comprehensive word "person." The word "person" is broad enough to include women unless a contrary intent appears in the statute. *Robinson's Case*, 131 Mass. 376, 377; *Opinion of the Justices*,

150 Mass. 586; see also *Opinion of the Justices*, 226 Mass. 607, 610. It is suggested, however, that the word "his," which is used throughout this section, indicates an intention to confine the word "person" to persons of the masculine gender. But R. L., c. 8, § 4, provides:—

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the general court, or repugnant to the context of the same statute; that is to say:—

Fourth, Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may be applied to females.

The provision of section 2 as to a requisition "not especially calling for women"; the provision of section 3 as to employment of veterans in the labor service of cities and towns not subject to civil service rules "in preference to all other persons except women"; and the provision of section 4 that that section "shall not apply to requisitions calling for women", do not, in my opinion, narrow the word "person." Those provisions do not directly qualify the definition of veteran contained in section 1. They merely prescribe certain rules as to those who are veterans within the meaning of that section. The question is not free from doubt, but it seems to me that the word "veteran" as used in section 1 includes women as well as men. Opinions of Hon. Henry C. Attwill, Attorney-General, and Hon. Henry A. Wyman, Attorney-General, to Hon. Charles L. Burrill, Treasurer and Receiver-General, dated, respectively, June 28, 1919 (Attorney-General's Report, 1919, p. 64), and Oct. 11, 1919, also point to this conclusion.

2. In my opinion, the answer to your second question follows from the answer to the first. Women who are veterans are to be placed upon those lists to which they are eligible above all other applicants who are not veterans, and, in answer to a requisition calling for women, women who are veterans are entitled to be certified ahead of women who are not veterans, even though the latter attained a higher percentage in the examination. The provision as to certifica-

tion "upon receipt of a requisition not especially calling for women," while somewhat obscure, is, in my judgment, intended to prevent the preference to veterans from overriding a sex limitation in the request itself.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Constitutional Law — Legislature — Power to define Words used
in Constitution — Legal Voter.*

The meaning of words used in the Constitution presents a judicial question. An act defining the term "legal voter," as used in the Constitution, if not unconstitutional as an attempted exercise of judicial power, would be, at most, a declaration of legislative opinion which would not foreclose the question of the meaning of those words.

MARCH 10, 1920.

Committee on Bills in the Third Reading.

GENTLEMEN:— You submit a proposed bill entitled "An Act to define the term 'legal voter.'" It appears from the letter which accompanies it that the proposed bill is intended to define the term "legal voter," as used in Mass. Const. Amend. XXI and XXII, for the guidance of the Secretary of the Commonwealth in taking the decennial census required by those amendments. You inquire in substance:—

1. Can the Legislature define what is meant by the words "legal voters" as used in said amendments?
2. What is meant by the words "legal voters" as used in said amendments?

The Bill of Rights, art. XXX, provides as follows:—

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

There can be no question that the meaning of any words used in the Constitution presents in the last analysis a judicial question. *Marbury v. Madison*, 1 Cranch, 137; *Capen v. Foster*, 12 Pick. 485; *Blanchard v. Stearns*, 5 Met. 298,

301; *Opinion of the Justices*, 5 Met. 591, 592; *Kinneen v. Wells*, 144 Mass. 497; *Opinion of the Justices*, 226 Mass. 607; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 337. The courts, and the courts alone, can finally declare what the true construction is. *Marbury v. Madison*, 1 Cranch, 137; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 337; *Kinneen v. Wells*, 144 Mass. 497; *Opinion of the Justices*, 226 Mass. 607. Yet both the Legislature and the executive also construe the Constitution. Every time the Legislature passes a statute it necessarily decides that the proposed enactment is within its constitutional powers. *Kendall v. Kingston*, 5 Mass. 524, 533. Officials charged with executive duties may find it necessary to determine what the Constitution means in order to obey its mandate. *Attorney-General v. Apportionment Commissioners*, 224 Mass. 598; *Donovan v. Apportionment Commissioners*, 225 Mass. 55; *McGlue v. County Commissioners*, 225 Mass. 59; *Brophy v. Apportionment Commissioners*, 225 Mass. 124. Neither the Legislature nor the executive invades the judicial function when either construes the Constitution in order to exercise an authority conferred by law. Yet if the Legislature attempts to decide a judicial question and to declare its decision by statute, it does invade the judicial function and its act is void. *Denny v. Mattoon*, 2 Allen, 361; *Forster v. Forster*, 129 Mass. 559; see also *Kilbourn v. Thompson*, 103 U. S. 168. Indeed, it has been intimated that the Legislature has no power to declare retroactively that the meaning of a statute was different from that placed upon it by the court. *Cambridge v. Boston*, 130 Mass. 357. In the present case the proposed statute undertakes to declare what shall be the meaning of two words in the Constitution. The definition stands alone, and is in no way incident to legislation otherwise valid. It is open to grave question whether this statute is not an attempt by the Legislature to exercise judicial power contrary to article XXX of the Bill of Rights.

But putting that question aside, the bill would, at most, be only a declaration of legislative opinion, which could not foreclose the question. Mass. Const. c. I, § II, art. II, and c. I, § III, art. IV, as modified by Amendments III, XVII, XX, XXVIII, XXX, XXXI, XXXII and XL, define the qualifications of the electorate. These qualifications cannot be modified by statute. *Kinneen v. Wells*, 144 Mass. 497;

Blanchard v. Stearns, 5 Met. 298, 301; *Opinion of the Justices*, 5 Met. 591, 592; *Opinion of the Justices*, 226 Mass. 607. It is true that the Legislature, as an incident of its power to provide for elections, may also provide for the registration of those qualified to vote upon due proof of the qualifications prescribed by the Constitution. *Capen v. Foster*, 12 Pick. 485. In defining those entitled to such registration, it has enumerated the constitutional qualifications for the vote without apparently usurping judicial power. *Capen v. Foster*, 12 Pick. 485; *Stone v. Smith*, 159 Mass. 413; see also R. L., c. 11, § 12. But such enumeration, even as a part of an otherwise valid election law, is invalid if it conflicts with the constitutional definition. *Kinneen v. Wells*, 144 Mass. 497; *Opinion of the Justices*, 226 Mass. 607. It is true that Amendments XXI and XXII do not define "legal voters" with the fulness and precision with which the qualifications for the ballot are defined by the articles heretofore enumerated. Yet the term "legal voters" possesses a definite constitutional meaning which must be determined from the Constitution as a whole. It follows, therefore, that the proposed bill, if enacted, could not foreclose the question or stand unless the definition therein contained should exactly conform to the construction of those words ultimately adopted by the Supreme Judicial Court. In my opinion, the Legislature should not volunteer a legislative expression of opinion upon a judicial question, especially in view of the serious doubt whether the proposed bill would not amount to a usurpation of judicial power.

The answer to your first question renders it unnecessary, in my opinion, for me to answer your second question. I do not feel that I ought to frame a definition of "legal voter" for the purpose of the proposed bill.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Infamous Punishment — Sentence to State Prison upon Complaint.

In so far as Gen. St. 1916, c. 187, § 1, authorizes any district court or trial justice to impose a sentence to the State Prison upon complaint, it violates article XII of the Bill of Rights, which requires that a sentence to the State Prison shall not be imposed except upon an indictment duly presented by a grand jury.

MARCH 15, 1920.

HON. SANFORD BATES, *Commissioner of Correction.*

DEAR SIR: — You inquire whether, in view of St. 1911, c. 176, Gen. St. 1916, c. 187, confers upon a district court or trial justice authority to sentence to the State Prison an inmate, transferred from that prison to the Prison Camp and Hospital, who escapes from the latter institution and is later recaptured.

Gen. St. 1916, c. 187, § 1, amends St. 1904, c. 243, § 2, so as to read as follows: —

A prisoner who escapes, or attempts to escape, from the land or buildings of said camp, now known as the prison camp and hospital, or from the custody of an officer while being conveyed thereto, or therefrom, or while employed therein, may be pursued and recaptured; and upon complaint before any district court or trial justice may be punished for such escape, or attempt to escape, by a sentence of imprisonment at the institution to which he was originally sentenced for not less than one year nor more than five years. The expense of supporting such prisoner shall be paid by the institution to which he is sentenced, and the expense of committing him shall be paid by the prison camp and hospital.

St. 1905, c. 355, authorized the prison commissioners to establish a hospital prison at Rutland. Section 2 of that act authorized the prison commissioners, under certain conditions, to remove "any male prisoner in the state prison" to such hospital prison. By St. 1906, c. 243, the hospital prison and the temporary industrial camp for prisoners were consolidated into one institution to be known as the Prison Camp and Hospital. Construing Gen. St. 1916, c. 187, § 1, in connection with these other statutes, it seems plain that it purports to confer power upon any district court or trial justice, *upon complaint*, to sentence to the State Prison any inmate of the Prison Camp and Hospital who was originally sentenced to the State Prison and who escapes or attempts to escape from the Prison Camp and Hospital.

Viewed as a question of construction, the authority which Gen. St. 1916, c. 187, § 1, purports to confer upon any district court or trial justice cannot be limited by St. 1911, c. 176, § 1. The earlier enactment must yield to the later enactment if the later enactment be constitutional. Moreover, the provisions of St. 1911, c. 176, § 1, which in effect deny authority to police, district and municipal courts to sentence to the State Prison, and limit the sentence which they may impose to not exceeding two years in the house of correction, are expressly confined to that act. For both reasons St. 1911, c. 176, cannot be held to limit Gen. St. 1916, c. 187.

The serious question is whether Gen. St. 1916, c. 187, § 1, is constitutional in view of article XII of the Declaration of Rights, which provides:—

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

The objection that Gen. St. 1916, c. 187, provides for a sentence to the State Prison without trial by jury is met by the right of appeal to the Superior Court, where a jury trial may be had. *Jones v. Robbins*, 8 Gray, 329. But such right of appeal leaves untouched the further objection that the trial in the Superior Court will be had upon the complaint authorized by Gen. St. 1916, c. 187, and not upon an indictment duly presented by a grand jury. *Jones v. Robbins*, 8 Gray, 329. It is now settled law that article XII of the Bill of Rights requires that the crime shall be charged by an indictment duly presented by a grand jury, if, upon conviction, the accused may be sentenced to the State Prison, since such a sentence is an "infamous punishment," within the meaning of that article. *Jones v. Robbins*, 8 Gray, 329; *Nolan's Case*, 122 Mass. 330; *Commonwealth v. Horregan*, 127 Mass. 450; *Com-*

monwealth v. Harris, 231 Mass. 584; *Opinion of the Justices*, 232 Mass. 601. It is true that trial upon information or complaint, even for murder, is "due process of law," within the meaning of the Fourteenth Amendment to the Federal Constitution. *Hurtado v. California*, 110 U. S. 516. But this decision cannot be held to alter the construction which our court has placed upon article XII of the Bill of Rights. I am therefore constrained to advise you that Gen. St. 1916, c. 187, is unconstitutional in so far as it attempts to authorize a district court or trial justice to impose a sentence to the State Prison.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Street Railway — Fixing Fare of Blind Person accompanied by Sighted Guide.

A proposed bill which would require street railways to carry a blind person for half fare and a sighted guide who accompanies him for full fare would be unconstitutional.

MARCH 18, 1920.

Hon. EDWIN T. MCKNIGHT, *President of the Senate*.

DEAR SIR: — I have given careful consideration to the bill transmitted with the order of the Honorable Senate, dated March 12, 1920, which reads as follows: —

Ordered, That the Senate require the opinion of the Attorney-General as to the constitutionality of Senate Bill No. 201, relative to the transportation of blind persons accompanied by guides on street, steam or elevated railroads or railways.

A question arises as to the construction of the proposed bill. Under section 1 it is by no means clear whether the intention is that the blind person and his sighted guide shall each pay half fare, or whether the blind person shall pay half fare and the sighted guide full fare. But taking the language of section 1 and section 2 together, the more natural construction seems to be the latter, viz.: that the blind person shall pay half fare and the sighted guide shall pay full fare. Assuming that this is the true construction, the bill in substance provides that a blind person whose name appears upon the register of the Massachusetts Commission for the Blind, who obtains from

that Commission the prescribed identification card upon payment of a fee, who is obliged to travel from place to place in pursuance of his legitimate occupation, and who is accompanied by a sighted guide for safety and protection, shall pay one-half the regular fare charged by street, steam or elevated railroads or railways to other passengers for the same service.

In my opinion, this bill is open to several constitutional objections.

1. In its present form the bill is not limited to regulation of rates of fare in intrastate commerce. The power to regulate rates of fare in interstate commerce is possessed by Congress alone. Unless, therefore, the bill is amended to confine its operation to fares to be charged for travel wholly within the Commonwealth, it will be clearly unconstitutional upon this ground.

2. There is a further question whether the bill, which requires carriers to grant a reduced rate to a particular class, may not be confiscatory. There is no question that the Commonwealth has power to prescribe reasonable rates of fare to be charged by carriers for travel wholly within the Commonwealth. Whether a rate is confiscatory is a mixed question of law and fact, to be determined in each particular case upon all the facts.

It is well known that many steam and electric roads at the present time are not able at the present rates of fare to earn more than operating expenses, and in numerous instances they are not earning operating expenses. Any statute which would require a carrier to lower the rate of fare to a certain class of the traveling public would be confiscatory, and therefore unconstitutional, if it resulted in reducing the return to the carrier below that reasonable minimum to which it is entitled.

3. The ordinary rule of law is that public service companies shall serve all who apply, without discrimination, at a reasonable rate. A law which provides a special rate to a particular class purports to authorize a discrimination in favor of that class. It may well be that the cost of the discrimination must be made up by charging a larger rate to the rest of the traveling public in order to produce that reasonable return to which the carrier is entitled. Even the Legislature has a very limited power to provide for a discrimination in favor of a

particular class of the traveling public at the expense of the traveling public as a whole. *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684. An arbitrary classification cannot be made. *Chicago, R. I. & P. Ry. v. Ketchum*, 212 Fed. Rep. 986. In my opinion, a valid classification must be adapted to promote a sufficient public purpose. Thus the law granting a half fare to school children and other persons traveling to and from schools maintained by the public, and private schools of a like kind, was sustained by the court against the contention that such a classification was arbitrary, on the ground that that classification tended to promote a public purpose, namely, education. *Commonwealth v. Interstate Consolidated Ry.*, 187 Mass. 436; *Commonwealth v. Connecticut Valley St. Ry.*, 196 Mass. 309; *Commonwealth v. Boston & Northern St. Ry. Co.*, 212 Mass. 82. The Interstate Railway Case (*supra*) was affirmed by the Supreme Court of the United States in 207 U. S. 79, on the very narrow ground that as the statute was in force at the time when the company received its charter, that company could not complain of it. See also *San Antonio T. Co. v. Altgelt*, 200 U. S. 304.

On the other hand, a statute which requires carriers to grant a reduced rate to a particular class upon private grounds peculiar to that class is clearly invalid. Thus a statute which requires a railroad to grant free transportation to one who accompanies a shipment of cattle is arbitrary and void. *Atchison, etc. R. Co. v. Campbell*, 61 Kan. 439; *McCully v. Chicago, B. & Q. R.R.*, 212 Mo. 1; *George v. Chicago, R. I. & P. Ry. Co.*, 214 Mo. 551. The reasoning of these cases is to the effect that where a reasonable rate has been prescribed, the Legislature cannot prescribe a reduction from that rate to some private class of travelers selected by the Legislature. The present bill seems to fall within this principle. It prescribes a reduced rate for a particular class of blind persons. Unless the classification rests upon a public purpose sufficient to justify it, this bill could not stand. It would open the door to laws designed to afford special rates to almost any class which the Legislature might select for special favors to be rendered by carriers at the carriers' expense. Such a principle substitutes legislative discrimination for corporate discrimination.

For the foregoing reasons the bill under consideration would be unconstitutional.

I am of opinion, however, that if there should be substituted for the present compulsory bill a proper permissive bill, applicable to intrastate commerce only, the constitutional objections pointed out above might be avoided. Any railroad which might choose to avail itself of such permission to carry a blind person and a sighted guide for a single fare, in order to lessen the chance of accident, with possible liability for damages, could not object that such a bill was either arbitrary or confiscatory, or, on the ground of such voluntary action, ask to raise ordinary fares. Such permissive legislation might be supported also by the precedent of the Federal railroad law, and the regulations of the Interstate Commerce Commission thereunder, which permit but do not require a special rate to certain designated classes of persons, such as ministers.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — "Anti-aid" Amendment — Religious Worship — State Institutions.

The expenditure of money at the various insane hospitals and other State institutions for the purpose of affording inmates therein the opportunity for worship is not prohibited by the provisions of article XLVI of the Amendments to the State Constitution.

MARCH 25, 1920.

Committee on Ways and Means.

GENTLEMEN:— You state that the Legislature is in the habit of appropriating funds for religious instruction at the various insane hospitals and other State institutions. These funds are then paid by the institutions to Protestant, Catholic and Jewish clergymen. At several of the penal institutions there is an official called a chaplain, who is appointed by the superintendent and who receives an annual salary from the Commonwealth for religious work. You request my opinion as to whether this practice of paying for religious instruction at public expense is in accordance with the provisions of article XLVI of the Amendments to the Constitution.

Under the provisions of article XLVI, section 2, " . . . no grant, appropriation or use of public money . . . shall be made or authorized by the commonwealth . . . for the pur-

pose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, . . .”

As the institutions referred to in your communication are neither schools nor institutions of learning, the provisions of said section, as above quoted, do not apply.

Said section 2 further prohibits the expenditure of public moneys “for the purpose of founding, maintaining or aiding . . . any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers . . .”

As the institutions in question are publicly owned and under the exclusive control, order, and superintendence of public officers, they are exempt from the provisions of section 2.

Section 4 of said article XLVI provides: —

Nothing herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; . . .

Construing together sections 2 and 4 of article XLVI, I am of opinion that the broad purpose intended by the amendment was to prevent the use of public money to build up private denominational institutions, or schools and institutions of learning, whether under public control or otherwise, where any denominational doctrines were being inculcated. It was not intended to banish all forms of religious worship from State institutions or to prohibit the incidental expenditure of public money for religious worship in such institutions, simply because these institutions were being maintained out of the public funds.

I therefore advise you that the expenditure of money by these institutions for the purpose of affording inmates therein the opportunity for worship is a legitimate expenditure out of the funds appropriated for the maintenance of these institutions or directly out of the funds of the Commonwealth.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

State Sanatoria — Cities and Towns — Payment for Clothing supplied to Indigent Patients.

Cities and towns which pay the price fixed by St. 1907, c. 474, § 10, for the support of patients in State sanatoria, cannot be made to supply clothing to said patients who, on account of their indigent condition, are unable to provide clothing for themselves.

MARCH 29, 1920.

WILLIAM J. GALLIVAN, M.D., *Director, Division of Tuberculosis, Department of Public Health.*

DEAR SIR: — You request my opinion as to whether cities and towns where patients of State sanatoria have legal settlement can be required to provide clothing for such of said patients as are in dire need of clothing, and who, because of their indigent condition, are unable to provide it for themselves.

St. 1907, c. 474, provides for the establishment of State sanatoria for tubercular patients. The money necessary for their maintenance is appropriated annually by the Legislature from the ordinary revenue of the Commonwealth.

There is no liability on the part of cities and towns for the payment of charges for the support of patients in these sanatoria except as provided by section 10 of said chapter, and except in so far as cities and towns are liable for the support of all poor and indigent persons lawfully settled therein, as provided by R. L., c. 81, § 1, which provides: —

Every city and town shall relieve and support all poor and indigent persons lawfully settled therein, whenever they stand in need thereof.

St. 1907, c. 474, § 10, provides: —

The charges for the support of each inmate in a state sanatorium shall be four dollars a week, and shall be paid quarterly. Such charges for those not having known settlements in the Commonwealth shall be paid by the Commonwealth, and may afterward be recovered by the treasurer and receiver general of the patients, if they are able to pay, or of any person or kindred bound by law to maintain them, or of the place of their settlement subsequently ascertained; but for those having known settlements in this Commonwealth, the charges shall be paid either by the persons bound to pay them, or by the place in which such inmates had their settlement, unless security to the satisfaction of the trustees is given for their support. If any person or place refuses or neglects to pay such charges the treasurer and receiver general may

recover the same to the use of the sanatorium, as provided in section seventy-nine of chapter eighty-seven of the Revised Laws. A city or town which pays the charges for the support of an inmate of a state sanatorium shall have like rights and remedies to recover the amount thereof, with interest and costs, from the place of his settlement or from such person of sufficient ability, or from any person bound by law to maintain him, as if such charges had been incurred in the ordinary support of such inmate.

The price to be charged for the support of each patient is definitely fixed in said section at \$4 per week. The liability of cities and towns is also fixed at \$4 per week, as the words "the charges," as used in that part of said section which provides for payment by cities and towns, refer to the words "four dollars per week," stipulated in the first sentence of said section 10 as the amount of the charges.

As the sum to be paid by cities and towns is definitely fixed, and as said payment is to be made for the support of the patient, the real query is whether or not, in addition to the payment of the said sum of \$4, cities and towns are liable for moneys expended for clothing supplied to such of said patients as are unable, because of their indigent condition, to provide necessary clothing for themselves.

This depends upon the meaning of the word "support," as used in St. 1907, c. 474, § 10.

In the case of *Gould v. City of Lawrence*, 160 Mass. 232, the question before the court was whether cities and towns are liable to the Commonwealth for moneys expended for clothing supplied to paupers confined in the lunatic asylum at Danvers. Mr. Justice Knowlton said: —

The word "support" is often used in our statutes, and in its ordinary signification it includes not merely board, but everything necessary to proper maintenance.

In that case it was held to include clothing.

There is nothing to indicate that the Legislature intended to limit the use of the word "support" in this statute to mere board and lodging, or so as to have a meaning other than that which it has commonly acquired.

As the word "support" is used in the same sense in St. 1907, c. 474, § 10, as in R. L., c. 81, § 1, and as supplying necessary clothing would be included within the meaning of

the word "support," as used in said section 10, I am of the opinion that cities and towns which pay the price fixed by St. 1907, c. 474, § 10, for the support of patients in State sanatoria cannot be obliged to supply clothing to said patients who, on account of their indigent condition, are unable to provide clothing for themselves.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Intoxicating Liquor — Eighteenth Amendment — Effect on State Legislation — Druggist's License.

Neither article XVIII of the Amendments to the Federal Constitution nor the Volstead Act passed by Congress to enforce the same nullifies those provisions of our State law which provide for the issue of licenses to druggists to sell liquor for medicinal purposes, but such a license issued under State law does not relieve the druggist from the duty to comply with the Federal law also.

MARCH 29, 1920.

Board of Registration in Pharmacy.

GENTLEMEN: — You ask my opinion on the following: —

This office has been in receipt of several inquiries regarding the State liquor laws. The claim has been made by various persons that the prohibition amendment to the Constitution of the United States renders any State law regarding liquors null and void. . . .

It has been our contention and also the contention of the Boston licensing board that the State laws are in full force and effect in such sections as do not conflict with prohibition laws and liquor regulations of the government.

If the claim of these persons is correct, that the State liquor laws have been rendered null and void, of course our revenue from liquor license certificates will cease April 30.

Your inquiry is, in substance, whether article XVIII of the Amendments to the Constitution of the United States and the act of Congress passed pursuant thereto suspend or nullify those portions of our State laws which provide for the issue of licenses to druggists to sell liquor for medicinal purposes.

The material portion of article XVIII provides as follows: —

SECT. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the

United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECT. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

The first section of this amendment prohibits certain acts, including the sale of liquor for *beverage* purposes. It does not prohibit the sale of liquor for *medicinal* purposes. It follows that those portions of our State law which provide for the sale of liquor by druggists for medicinal purposes are not in conflict with the amendment and are not suspended or nullified thereby. Any doubt which might remain upon this point is removed by the express provisions of the act of Congress, known as the Volstead Act, in regard to the sale of liquor by druggists for medicinal purposes.

The second question is whether legislation by Congress under this amendment nullifies State laws inconsistent therewith. I am of the opinion that it does not. Section 2 of the amendment provides that Congress and the several States shall have "concurrent" power to enforce the amendment by appropriate legislation. In my opinion, this provision permits both the States and Congress to adopt independently any laws in regard to liquor which do not violate the prohibitions contained in section 1 of the amendment. The States cannot nullify any valid law which Congress may pass. Congress, on the other hand, cannot nullify any valid law which shall be in force in or be passed by the several States. Each system of legislation stands independent of the other. Each must be obeyed by the citizen. Compliance with the Federal law will not excuse a breach of the State law, nor will compliance with the State law excuse a breach of the Federal law. A violation of both laws would be an offence under each. As a practical matter, that law, Federal or State, which is most severe and which most restricts the liberty of the citizen in regard to liquor, is the law which marks the limit beyond which he may not go without being guilty of an offence. If, however, the State law and the Federal law each permit an act, but prescribe different conditions, the act is unlawful unless the citizen complies with the conditions prescribed by each law.

I am therefore of opinion that the so-called Volstead Act does not nullify the provisions of our State law in regard to

druggists' licenses. But a State license does not in any way relieve druggists from the necessity of procuring in addition a license under the Federal law. A State license only authorizes the sale of liquor for medicinal purposes in so far as the law of this Commonwealth is concerned. The druggist must in addition comply with the Federal law.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*State Examiners of Plumbers — Master Plumber's License —
Renewal — Refusal because Applicant is not actively en-
gaged in Business.*

Under St. 1909, c. 536, the State Examiners of Plumbers cannot refuse to renew a master plumber's license because said plumber is not actively engaged in business at the time of the application for renewal.

MARCH 29, 1920.

State Examiners of Plumbers.

GENTLEMEN: — You request my opinion as to whether the State Examiners of Plumbers can refuse to renew a master plumber's license because the owner of such license is not actively engaged in business at the time of the application for renewal.

St. 1909, c. 536, creates a board to be known as the State Examiners of Plumbers, provides for examinations to be given to persons desiring to engage in the business of plumbing as master plumbers, and for the issuance of licenses to such persons as successfully pass said examinations.

Section 4 provides: —

. . . Licenses shall be issued for the term of one year, and shall be renewable on or before the first day of May in each year upon the payment of the required fee. Each holder of a master plumber's certificate or of a license shall register his name and business address with the board of health of the city or town where the holder thereof desires to engage in the business of plumbing as a master plumber; . . .

Section 3 provides: —

. . . The fees for examination, and for renewals shall be fifty cents each. . . .

A license issued to a master plumber is merely a permit or authority to engage in the plumbing business and to perform

plumbing work either by himself or by journeymen plumbers in his employ. It may be exercised or not, as the licensee sees fit. The mere failure to engage in the business authorized under the permit would not, under the provisions of the statute, either revoke or terminate the said license.

A renewal of a license is, to all intents and purposes, equivalent to an original issue of the license, except that the person to whom the renewal is to be granted, having passed an examination prior to the original issue of the license, is not obliged to undergo another examination.

I am therefore of opinion that the State Examiners of Plumbers cannot refuse to renew a master plumber's license because the owner is not actively engaged in business at the time that he makes application for the renewal of his license.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Fish and Game — Possession of Trout and Certain Birds during the Closed Season.

The prohibition against having trout, ruffed grouse or woodcock in one's possession during the closed season bars the importation of the same into the State during that period.

MARCH 30, 1920.

MR. WILLIAM C. ADAMS, *Director, Division of Fisheries and Game, Department of Conservation.*

DEAR SIR:— You ask my opinion as to whether the laws relating to trout, quail and grouse prohibit their being brought into Massachusetts from another State during the closed season here.

The laws involved are as follows:—

St. 1909, c. 377, as amended by St. 1910, c. 469:—

It shall be unlawful for a person at any time to buy or sell or offer for sale a trout except as hereinafter provided, or to take or have in possession trout or salmon between the first day of August in any year and the first day of April of the year following. . . .

St. 1911, c. 236, as amended by Gen. St. 1919, c. 153, § 1:—

It shall be unlawful, excepting only between the twentieth day of October and the twentieth day of November of each year, both dates

inclusive, to hunt, pursue, take or kill a ruffed grouse, commonly called partridge, or a woodcock, or to have the same, *or any part thereof, in possession, whenever or wherever* the same may have been taken or killed; . . .

St. 1911, c. 356, as amended by Gen. St. 1919, c. 153,
§ 2:—

It shall be unlawful excepting only between the twentieth day of October and the twentieth day of November of each year, both dates inclusive, to hunt, pursue, take or kill a quail or *to have the same, or any part thereof, in possession.* . . .

The fish and game laws above mentioned are clearly intended to prevent the unlawful taking or killing of fish and game included in the prohibition during the closed season, and, in furtherance of this object, the having in possession of such fish or game is also made an offence. Without this provision, in many cases it would, obviously, be difficult to secure a conviction, as the burden would be on the Commonwealth to establish the fact that fish or game found in one's possession was caught or killed within the Commonwealth. It is fair to assume that the Legislature intended to prevent the evasion of the law, and thus made it unlawful to have such fish and game in one's possession during the closed season. The language used is clear, and there is no reason to doubt that such was the intention.

Yours very truly,

J. WESTON ALLEN, *Attorney-General.*

Cities and Towns — Notes.

A vote of a town appropriating a sum of money in excess of the amount called for by the warrant for the meeting is invalid, and town notes may not be issued thereunder.

MARCH 30, 1920.

MR. THEODORE N. WADDELL, *Director of Accounts, Department of Corporations and Taxation.*

DEAR SIR:—You ask whether you should certify town notes under a vote of the town authorizing an appropriation in excess of the amount called for by the article in the warrant, which was as follows:—

To see if the town will vote to raise and appropriate the sum of three thousand dollars to be used in reconstructing Salem Street, as recommended by the Massachusetts Highway Commission, or what action it will take thereon.

The vote was an appropriation of \$7,500 for the purpose of reconstructing a street, and provided that a part of said sum be borrowed on town notes.

I am of the opinion that the vote is invalid. The article in the warrant might have read, "to see if the town will reconstruct Salem Street and make an appropriation therefor." In that event, notice to the town would have been sufficiently given that the purpose of the article was to secure the reconstruction of Salem Street, and even without the words "make an appropriation therefor," it would have been proper to have made an appropriation under the article. *Blackburn v. Walpole*, 9 Pick. 97; *Avery v. Stewart*, 1 Cush. 496, 502.

In the case before us, however, the voters had notice of the proposal to raise and appropriate \$3,000 for specified purposes, and the voters thus had the right to assume that no larger appropriation would be voted. There not having been a sufficient notice given, the appropriation of \$7,500 was unwarranted, and you are not authorized to certify the town notes issued thereunder.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Elections — Presidential Primaries — Group Voting.

No provision is made for group voting for delegates in presidential primaries, and candidates must be voted for by a cross opposite the name of each candidate.

MARCH 31, 1920.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth*.

DEAR SIR: — You have asked my opinion as to whether in printing the ballots for the presidential primary you should cause to be placed over a group of candidates a circle, with instructions that the voter may vote for such group by placing a cross therein.

If a circle is to be placed over a group of candidates it is authorized only by the reference implied in St. 1913, c. 835, § 142, to section 108 of the same act.

Section 108, in part, provides: —

A cross (X) marked against a name shall constitute a vote for the person so designated. A cross in the circle at the head of a group of candidates for ward committees or for delegates to a state convention shall count as a vote for each candidate therein.

Section 142 is as follows: —

The provisions of law relating to primaries not inconsistent with the three preceding sections shall apply to presidential primaries so far as is practicable.

Section 140 of the same act provided for the manner of electing candidates in presidential primaries. This act was amended by Gen. St. 1916, c. 16, entitled "An Act to change the method of voting in presidential primaries," by striking out said section 140 and inserting the following detailed provisions: —

The secretary of the commonwealth shall cause to be placed upon the official ballot for use in primaries at which delegates to national conventions of political parties are elected, under separate headings, and in the following order, the names of candidates for delegates at large, alternate delegates at large, district delegates, and alternate district delegates. The names of candidates appearing in nomination papers which contain nominations for all the places to be filled shall be placed first on said ballot, arranged in groups and in the same order as in the nomination papers. The names of candidates appearing in nomination papers which contain nominations for less than all the places to be filled shall follow, alphabetically arranged. The ballot shall also contain a statement of the preference, if any, of each candidate for delegate as to a candidate for nomination for president, provided that such statement appears in his nomination papers; but no such statement or preference by any candidate for delegate shall appear upon the ballot unless such candidate for nomination for president files his written assent thereto with the secretary of the commonwealth on or before five o'clock of the last day for filing nomination papers. Such assent may be communicated by telegraph or cable. Upon the receipt of the records of votes cast at presidential primaries, the city or town clerk or election commissioners shall forthwith canvass the same and make return thereof to the secretary of the commonwealth, who shall forthwith canvass such returns, determine the results thereof, and notify the successful candidates.

Section 140, as amended by Gen. St. 1916, c. 16, is included in that portion of St. 1913, c. 835, which appears under the title "Provisions applying to presidential primaries."

It clearly appears that there is no express authorization for voting for a group of candidates by a cross in a circle at the head of the group, as provided in the case of groups of candidates for ward committees and for delegates to a State convention, under section 108 of the act.

Provision is made for the arrangement upon the ballot of candidates in groups in those cases where the names of candidates have appeared in groups on the nomination papers. Section 140, as amended, contains no provision as to the method of voting, and there is no express provision as to the method of voting in any of the sections included under the title "Provisions applying to presidential primaries."

The method of voting in presidential primaries is, therefore, governed by section 142, which provides that "the provisions of law relating to primaries . . . shall apply to presidential primaries so far as is practicable."

There is no provision of law relating to primaries which permits voting for a group of candidates by a single cross in a circle which has any general application. The only provision of law which authorizes voting for a group of candidates by a single cross is contained in section 108, to which reference has already been made, and is expressly limited to "a group of candidates for ward committees or for delegates to a state convention."

As it clearly appears there is no provision of law relating to primaries which authorizes the use of a single mark in a circle, except in voting for a group of candidates for ward committees or for delegates to a State convention, I am constrained to advise you that the candidates in the presidential primaries must be voted for by a cross against the name of each candidate.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Jurisdiction — Crimes committed on Federal Property.

The courts of the Commonwealth have no jurisdiction over a crime committed on the premises of the Watertown Arsenal, which is the property of the United States of America.

APRIL 5, 1920.

EUGENE R. KELLEY, M.D., *Commissioner of Public Health.*

DEAR SIR:— You have asked my opinion as to whether the courts of the Commonwealth have jurisdiction over a certain crime committed on the premises of the Watertown Arsenal. The crime referred to is a violation of R. L., c. 56, § 55, and St. 1907, c. 216, and from your letter I understand that the defendant is specifically charged with a violation of the law in regard to a sale of milk. This sale took place on the premises of the Watertown Arsenal, which is the property of the United States of America, over which our courts have no jurisdiction except as to service of process, to prevent such property from becoming a haven for those desiring to avoid suit or prosecution to which service of process is a prerequisite.

The case of *Commonwealth v. Clary*, 8 Mass. 72, has been followed or cited with approval in several cases, and is the law in this Commonwealth. It is my opinion, therefore, that our courts have no jurisdiction over the offence charged, and that the defendant's contention is correct.

Very truly yours,

J. WESTON ALLEN, *Attorney-General.*

Schools — Attendance — Requirements.

Under Gen. St. 1915, c. 81, as amended by Gen. St. 1919, c. 281, children between fourteen and sixteen years of age are required to attend school only in case they do not possess such ability to read, write and spell the English language as is required to complete the sixth grade course.

APRIL 13, 1920.

E. LEROY SWEETSER, Esq., *Commissioner of Labor and Industries.*

DEAR SIR:— You ask my opinion on the following:—

Gen. St. 1915, c. 81, § 1, as amended by Gen. St. 1919, c. 281, provides, in part as follows:—

Every child between seven and fourteen years of age, every child under sixteen years of age who does not possess such ability to read, write and spell in the English language as is required for the completion of the sixth grade of the

public schools of the city or town in which he resides . . . shall attend a public day school in said city or town or some other day school approved by the school committee, . . .

The question raised is whether or not a child, before receiving a certificate, should be required to complete the course in reading, writing and spelling of the sixth grade, or whether it is sufficient if, in the opinion of the superintendent, a child possesses the ability to read, write and spell in the English language equivalent to completing the sixth grade course.

The statute divides school children into two classes, according to age. Those between seven and fourteen years of age are required to attend school until they reach the age of fourteen years, even if they advance beyond the requirements of the sixth grade. In the case of children between fourteen and sixteen years of age attendance only in case the child does not possess such ability to read, write and spell in the English language as is required to complete the sixth grade. This test is, in my opinion, a mental one. The condition of receiving the certificate is not the completion of the sixth grade, but the possession of sufficient knowledge of English to complete it. Between seven and fourteen years the test is an age test only; between fourteen and sixteen years the test is the possession of the ability to read, write and spell English in accordance with the statutory requirement.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

*Treasury — Collection of Revenue — Abandonment of Contract —
Payment of Penalty by Bonding Company.*

Under the provisions of Mass. Const. Amend. LXIII, § 1, providing that "all money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof," a sum of money received from a bonding company, reimbursing the Commonwealth for the excess amount expended in completing a work upon a contractor's abandoning the same, should be paid directly into the treasury of the Commonwealth.

APRIL 24, 1920.

Mr. WILLIAM D. HAWLEY, *Deputy Auditor of the Commonwealth*.

MY DEAR SIR: — You request my opinion upon the following set of facts: —

Chapter 50 of the Resolves of 1918 appropriated to the Department of Mental Diseases the sum of \$385,000 for the construction of a male infirmary group at the Boston State Hospital. A contract for this work was awarded to a contractor for the sum of \$250,000. The said contractor abandoned the work early this year, and the Commonwealth, with the assent of the surety on the contractor's bond, proceeded to complete the work. It is now estimated by the architects that there will be needed approximately \$6,585 in excess of the contract price. This excess is to be paid to the Commonwealth in due course by the surety company. The specific question you ask is whether or not it will be necessary to obtain an additional appropriation, or can the amount when received from the bonding company be applied directly to the payment of bills incurred in the completion of the infirmary.

Mass. Const. Amend. LXIII, § 1, provides that "all money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof."

Accordingly, it is my opinion that the amount that the bonding company is to pay should, when received, go directly into the treasury of the Commonwealth, and, therefore, the sum necessary to complete the building in excess of the appropriation should go into the coming supplementary budget.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Commissioner of Banks — Corporation — Corporate Name —
Use of Word "Bankers."*

St. 1908, c. 590, § 16, as amended by St. 1914, c. 610, does not prohibit a corporation using the word "bankers" as a part of its corporate name.

APRIL 26, 1920.

MR. JOSEPH C. ALLEN, *Commissioner of Banks*.

MY DEAR SIR: — You request my opinion as to whether a corporation can use the word "bankers" as a part of its corporate name.

St. 1908, c. 590, § 16, provides, in part, that no corporation shall make use of any printed paper having thereon any name or other word or words indicating that such business is the

business of a savings bank. The use of the word "bankers" is not prohibited by this prohibition.

It is to be noted that said section 16 was amended by St. 1914, c. 610, which provides, in substance, that no one thereafter should transact business under any name or title which contains the words "bank" or "banking" as descriptive of said business.

It is further to be noted that section 17, which authorizes the Commissioner to examine the accounts, books, papers, etc., of any one doing a banking business or of any corporation, person, partnership or association which has the words "bank", "banking" or "trust" in the name under which its business is conducted, was amended by Gen. St. 1918, c. 44, in part, by inserting after the word "banking," in the fifth and sixth lines, the words "banker" and "bankers." The effect of this latter amendment in this connection was to give the Commissioner authority to examine the accounts, etc., not only of any corporation which had the word "bank" and "banking" in the name under which its business was conducted, but also similarly to examine any corporation which had the words "banker" or "bankers" in its name. However, the Legislature did not at that time amend the last part of section 16 by inserting after the words "bank" or "banking", the words "banker" or "bankers", with the result that, in my opinion, it is still possible for any person, partnership, corporation or association to transact business under a name or title which contains the words "banker" or "bankers". If this situation is one that should be corrected it will be necessary for the Legislature to amend the last part of said section 16 along the lines indicated.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Taxation — Appropriation of Public Funds — Public Purpose — State House — Assignment of Rooms — Furnishing, Upkeep and Maintenance of Rooms — United Spanish War Veterans.

A bill providing for the assignment of a room or rooms in the State House for the free use of the United Spanish War Veterans would be constitutional, if enacted, for the assignment of a room or rooms for this purpose is for a public purpose.

There is nothing in Mass. Const. Amend. XLVI, the so-called "anti-aid" amendment, nor in article LXII of the Massachusetts Constitution that prevents the Commonwealth assigning rooms for this purpose.

Under the provisions of the bill, that the use of the rooms is "for the storing and preserving the records and other property of the said department and relics and mementoes of the war," the Commonwealth may appropriate money for the furnishing, upkeep and maintenance of such rooms.

APRIL 27, 1920.

MR. FRANK E. LYMAN, *Chairman, House Committee on Ways and Means.*

MY DEAR SIR: — You have requested my opinion upon certain questions in connection with House Bill No. 1445, relative to the assigning of quarters in the State House for the use of the United Spanish War Veterans. Your committee desires an opinion as to whether or not the Commonwealth may, consistently with the so-called "anti-aid" amendment to the Constitution (art. XLVI), and art. LXII, assign a room or rooms in the State House for the free use of the United Spanish War Veterans, to be under the charge of the State commander of the department, and may appropriate money for the furnishing, upkeep and maintenance of such room or rooms.

House Bill No. 1445 provides as follows: —

SECTION 1. The superintendent of buildings, with the approval of the governor and the council, is hereby authorized and directed to assign a room or rooms, suitably furnished, in the state house for the use of the United Spanish War Veterans, to be under the charge of the state commander of the department. The headquarters thus established shall be used for storing and preserving the records and other property of the said department and relics and mementoes of the war. The records shall be accessible at all times, under suitable rules and regulations, to members of the department and others engaged in collecting historical information.

SECTION 2. Whenever the United Spanish War Veterans cease to exist as a department or organization, the records, papers, relics and other effects of whatever character belonging to the said department, shall become the property of the commonwealth.

It is my opinion that there is nothing in section 2 of article XLVI, the so-called "anti-aid" amendment, and nothing in article LXII, which forbids the giving or loaning of the credit of the Commonwealth to any private enterprise, that prevents the Commonwealth from assigning a room or rooms in the State House for the purposes set forth in the House bill in question.

The real question raised is as to whether or not an assignment of a room in the State House for this purpose is for a public purpose.

The reasonable use of public money for similar purposes has been sanctioned by several different statutes, and has been upheld by the courts as a public purpose, in that the Commonwealth thus recognized valuable services given in war and thus promoted loyalty and patriotism.

It is to be noted that the provisions of the present bill follow closely the provisions of R. L., c. 10, § 21, which provides for the assignment of a room in the State House to the Grand Army of the Republic, and that the language is exactly the same as Spec. St. 1919, c. 246, relative to the assignment of quarters in the State House for the use of the Massachusetts Branch of the American Legion.

It is also my opinion that the Commonwealth may appropriate money for the furnishing, upkeep and maintenance of such room or rooms, in view of the fact that the use of the room or rooms by the terms of the proposed bill is defined to be "for the storing and preserving the records and other property of the said department and relics and mementoes of the war."

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Employees — Discharge — Hearing — Veteran Fireman on
Boston Police Boat.*

A civilian fireman employed under authority of St. 1906, c. 291, § 8, upon the police boat operated by the police department of the city of Boston, is a State employee.

Such civilian fireman, if a veteran, is entitled to a hearing upon his discharge before the Associate Commissioners of Labor and Industries instead of before the city council of Boston.

APRIL 28, 1920.

Hon. EDWIN U. CURTIS, *Police Commissioner for the City of Boston.*

DEAR SIR: — You ask my opinion upon the following case: —

The police boat operated by the police department of Boston performs the functions of a floating patrol wagon. At present the firemen employed upon this boat are civilians, who are employed by the Police Commissioner under authority of St. 1906, c. 291, § 8. It is proposed to replace these civilian firemen with members of the police force, in order to increase the police strength of this floating patrol wagon. One of these civilian firemen is a veteran who is entitled to a hearing upon his discharge. Under R. L., c. 19, § 23, as amended by St. 1910, c. 500, the hearing must be before the city council if he is a city employee, and before the State Board of Conciliation and Arbitration (now succeeded by the Associate Commissioners of Labor and Industries, see Gen. St. 1919, c. 350, §§ 69-72) if he is a State employee. You inquire whether he is a State or a city employee.

St. 1878, c. 244, provided that the mayor of Boston should appoint three police commissioners, who should have charge of the police department. St. 1885, c. 323, provided that the commissioners should be appointed by the Governor, with the advice and consent of the Council. All the powers of the former police commissioners, except as otherwise provided, were transferred to the new commission. *Commonwealth v. Plaisted*, 148 Mass. 375. This statute contained no express authority to employ civilian employees, but no question can be made that it impliedly conferred such power. See *Sims v. Police Commissioner*, 193 Mass. 547. In that case the police commissioners having discharged such an employee without assigning any cause for his removal, as required by St. 1885, c. 266, § 5, in the case of a discharge by boards and officers

of the city of Boston, the employee sought reinstatement. In holding that the employee was not entitled to the rights of a city employee the court said: —

. . . The St. of 1885, c. 323, contains nothing to prevent the board of police of Boston from discharging one of their employees whenever in their judgment it might be advisable to do so; nor has our attention been called to any subsequent legislation having this effect, unless it be found in the statutes regulating the civil service and fixing the right of veterans presently to be considered. *O'Dowd v. Boston*, 149 Mass. 443; *Attorney-General v. Donahue*, 169 Mass. 18.

The petitioner was not protected by the provisions of St. 1885, c. 266, § 5, that officers and boards of the city of Boston may remove their subordinates "for such cause as they may deem sufficient and shall assign in their order for removal," because the police commissioners were not officers or a board of the city of Boston, but were appointed by and were responsible to the Governor of the Commonwealth. *Commonwealth v. Plaisted*, 148 Mass. 375, 383, *et seq.*; *Philips v. Boston*, 150 Mass. 491, 494. . . .

St. 1906, c. 291, § 7, provides for the appointment of a single police commissioner by the Governor, with the advice and consent of the Council, to succeed the former board of three commissioners similarly appointed. Section 10 confers upon such commissioner all the powers and duties of the former board, except as otherwise provided. Section 8 further provides, in part: —

. . . The city of Boston shall provide all such accommodations for the police of said city as said police commissioner may require. All buildings and property used by said police shall be under control of said police commissioner.

Said police commissioner may employ such clerks, stenographers and other employees as he may deem necessary for the proper performance of the duties of his office.

All expenses for the maintenance of buildings, the pay of the police, clerks, stenographers and other employees, and all incidental expenses incurred in the performance of the duties of said commissioner or in the administration of said police shall be paid by the city of Boston upon the requisition of said police commissioner.

The employee in question is, I understand, employed under this provision. If the employee in the Sims case was a State employee there would seem to be little question that the present employee is a State employee likewise. See opinion

of Hon. Henry A. Wyman, Attorney-General, to the police commissioner for the city of Boston, dated Sept. 16, 1919.

I therefore advise you that the hearing should be held before the Associate Commissioners of Labor and Industries (see Gen. St. 1919, c. 350, §§ 69-72), and not before the city council.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Constitutional Law — State Bonds — Contract with Bondholder
— Sinking Fund Provisions.*

A bond issued by the Commonwealth, which provides that it "shall be deemed a pledge of the faith and credit of the Commonwealth," constitutes a contract with the holder faithfully to perform the sinking fund provisions contained in R. L., c. 6, §§ 69, 70 and 71, which contract is within U. S. Const., art. I, § 10.

Although neither the obligation of the bond itself nor the obligation of the contract relative to the maintenance of the sinking fund to pay it can be enforced in court by any person against the Commonwealth without its own consent, unanswerable considerations of public policy, of duty to the taxpayers and of public honor require that both obligations be punctually and strictly performed.

APRIL 30, 1920.

Committee on Ways and Means.

GENTLEMEN: — I have considered your inquiry of April 6. As bearing upon this inquiry you call my attention to R. L. c. 6, §§ 69, 70 and 71, which provide as follows: —

SECTION 69. The income or any surplus of funds belonging to or in the custody of the commonwealth shall, unless otherwise provided, be added to the principal.

SECTION 70. When the accumulations of a sinking fund of the commonwealth are sufficient to extinguish at maturity the indebtedness for which it was established, its subsequent accumulations may be added by the treasurer to any sinking fund which is not sufficient to meet the indebtedness for which it was established.

SECTION 71. The treasurer, instead of selling any of the stocks or securities belonging to funds over which the commonwealth has exclusive control to meet maturing liabilities, may transfer them to any other of such funds upon terms and conditions approved by the governor and council.

As a typical example of a sinking fund provision you mention St. 1894, c. 497, § 8, which authorizes a state high-

way loan of \$300,000 for a period of thirty years at a rate not exceeding 4 per cent, provides that the bonds issued therefor "shall be deemed a pledge of the faith and credit of the commonwealth," and further provides: —

. . . The treasurer and receiver general shall, on issuing any of said scrip or certificates of indebtedness, establish a sinking fund for the payment of said bonds, into which shall be paid any premiums received on the sale of said bonds, and he shall apportion thereto from year to year, in addition, amounts sufficient with the accumulations to extinguish at maturity the debt incurred by the issue of said bonds. The amount necessary to meet the annual sinking fund requirements and to pay the interest on said bonds shall be raised by taxation from year to year.

You then inquire, in substance, what constitutional vested right the holder of a bond issued under these or substantially similar provisions has in the maintenance and application of the sinking fund so established.

Some State Constitutions contain special provisions relative to the creation and preservation of sinking funds to pay State bonds. *Graham v. Horton*, 6 Kan. 343; *Park v. Candler*, 113 Ga. 647; *Park v. Candler*, 114 Ga. 466; *McReynolds v. Smallhouse*, 8 Bush (Ky.), 447; 36 Cyc. 899. As our Constitution does not contain similar provisions these cases may be laid aside. There remains the question whether our statutory provisions for creation and application of a sinking fund constitute a contract with the bondholder within the meaning of section 10 of article I of the Federal Constitution, which provides: —

No state shall . . . pass any . . . law impairing the obligation of contracts.

If a State attaches to its bonds some special privilege, such as a provision that the bonds and coupons when due shall be receivable in payment of taxes and other demands due to the State, such provision constitutes a contract with the bondholder which the State may not impair by subsequent legislation. *Hartman v. Greenhow*, 102 U. S. 672; *Royall v. Virginia*, 116 U. S. 572; *Sands v. Edmunds*, 116 U. S. 585; *McGahey v. Virginia*, 135 U. S. 662; *McCullough v. Virginia*, 172 U. S. 102. An express pledge of property or of income to secure the bonds is within the protection of the constitutional prohibition.

Trustees of the Wabash & Erie Canal Co. v. Beers, 2 Black. 448; *Opinion of the Justices*, 190 Mass. 605. If the State authorizes a municipal corporation to issue bonds, it impliedly confers a general authority to impose taxes in order to pay principal and interest, which authority cannot be subsequently revoked. *Ralls County Court v. United States*, 105 U. S. 733. If a statute authorizes the municipality to issue the bonds and expressly requires the levy of an annual tax to pay interest, any surplus to be applied to principal, and further expressly devotes the proceeds of the tax to those purposes, such grant of authority enters into the contract with the bondholder and cannot later be withdrawn. *Von Hoffman v. Quincy*, 4 Wall. 535; *Louisiana v. Pillsbury*, 105 U. S. 278; *Mobile v. Watson*, 116 U. S. 289; *Graham v. Folsom*, 200 U. S. 248, 252. Provisions for the creation and maintenance of a sinking fund by the municipality in order to meet the bonds have likewise been held to be within the constitutional guarantee. *Warwick v. Rhode Island Hospital Trust Co.*, 38 R. I. 517. A statute which authorizes an issue of *State* bonds, and requires that a five and a half mill tax shall be levied annually to pay interest and redeem the bonds until all the bonds are discharged, has been held to create a contract with the bondholders, especially where a subsequent constitutional amendment expressly recognized a contractual relation. *Louisiana v. Jumel*, 107 U. S. 711, 719. I am not of course, unmindful that such a contract cannot be enforced by any court against a sovereign State without its own consent, but this is equally true of the bonds themselves. *Louisiana v. Jumel*, 107 U. S. 711; *Hans v. Louisiana*, 134 U. S. 1; *North Carolina v. Temple*, 134 U. S. 22; *Louisiana v. New York Guaranty and Indemnity Co.*, 134 U. S. 230.

On the other hand, a statute which authorizes a municipality to issue bonds and to levy a tax to pay them does not prevent a subsequent modification of the taxing provision which does not render the security insufficient. *Gilman v. Sheboygan*, 2 Black. 510. And where a statute authorized a city to issue bonds to meet the cost of a waterworks, provided for a sinking fund, and further directed that the price of water should be so regulated, if practicable and reasonable, as to produce a sufficient sum to pay the principal and interest of the bonds, it was held that the latter provision did not constitute a pledge of the water rates to pay the bonds. *Sinclair*

v. *Fall River*, 198 Mass. 248; see also I Op. Atty.-Gen., 263, 266. It is evident, therefore, that the question whether and to what extent a given statute constitutes a contract with the bondholder requires a very careful consideration of the circumstances of each case.

The question whether the Massachusetts sinking fund provisions constitute a contract is very close. It appears that it is customary to provide that the bonds "shall be deemed a pledge of the faith and credit of the commonwealth." Perhaps these words, if taken alone, might be so narrowly construed as to exclude the sinking fund provision from the security upon which the bondholder might legally rely, even though the usual sinking fund provision would seem broad enough to devote that fund to the payment of the bonds without further express words of pledge. The usual form of bond is merely an acknowledgment of indebtedness in a specified sum on a specified date, with interest at a specified rate, but it has generally been the custom to refer specifically to the act which authorizes the issue, thus calling to the attention of the bondholder the provisions for sinking fund, if any. Under all the circumstances, it seems that the pledge of the "faith" of the Commonwealth in addition to the pledge of its "credit" is broad enough to import an obligation faithfully to perform the sinking fund requirements and to administer that fund according to law. In any event, it can scarcely be doubted that bondholders have purchased Massachusetts bonds in reliance upon honorable observance of those provisions.

In my judgment, the question in the last analysis is not one of narrow legal construction. The duty to preserve the sinking funds, like the express promise to pay the bonds, rests upon the honor of the Commonwealth. The very fact that neither duty can be enforced by any court without the consent of the Commonwealth strengthens the obligation to keep faith. Moreover, strict observance of the obligation is in accord with sound business policy. Massachusetts has had occasion to borrow large sums in the past. Similar occasions will doubtless arise in the future. Any action which might call in question the good faith of the Commonwealth must inevitably be reflected not only in a higher interest rate but also in a restricted market for the bonds themselves. Moreover, the duty to preserve the sinking funds is owed not only

to the creditors of the Commonwealth but also to the citizens. The sinking fund provisions provide a means whereby the burden of discharging the public debt is spread over a considerable period of years. To preserve the sinking funds protects taxpayers who must ultimately discharge the debt. In the *Sinking-Fund Cases*, 99 U. S. 700, the Supreme Court, in speaking of a statute which established a sinking fund to meet the bonds of certain railroads, said:—

All that has been done is to make it the duty of the company to lay by a portion of its current net income to meet its debts when they do fall due. In this way the current stockholders are prevented to some extent from depleting the treasury for their own benefit, at the expense of those who are to come after them. This is no more for the benefit of creditors than it is for the corporation itself. It tends to give permanency to the value of the stock and bonds, and is in the direct interest of a faithful administration of affairs. It simply compels the managers for the time being to do what they ought to do voluntarily. The fund to be created is not so much for the security of the creditors as the ultimate protection of the public and the corporators.

These words are equally applicable to the sinking fund of a State. Aside from any constitutional restrictions, unanswerable considerations of public policy, of duty to the taxpayers, and of public honor require that the sinking funds be kept intact and be applied to the debts which they were created to pay.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Regulation of Fire Escapes — Door as an Obstacle to Means of Exit.

A door of a lodging room in a hotel which may at any time be locked or otherwise fastened, and which is the only means of egress to an outside fire escape, constitutes an obstacle that may interfere with the means of exit from the hotel in case of fire, within the meaning of St. 1914, c. 795.

APRIL 30, 1920.

Mr. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR:— I duly received your letter of March 8, in which you state as follows:

There is in the city of Boston a hotel of first-class construction, eight stories in height, having two wings, and at the end of each wing

a fire escape has been installed, by direction of the building commissioner of the city of Boston, as one of the necessary means of egress.

The only egress to each of the fire escapes in question is through either one of two rooms, both rooms in each wing being used as lodging rooms, and the doors, therefore, liable to be locked at any time, day or night.

Since the receipt of your letter a representative of the hotel in question has explained to me at some length the conditions with respect to the fire escapes at said hotel, and I have conferred with you in regard to the facts and the question upon which you request my opinion.

The specific question, as stated in your letter, on which you desire an opinion, is whether a door to a room in use as a lodging room, and liable to be occupied day or night, so that such door may be at any time locked or otherwise fastened, which door provides the only means of exit to an outside fire escape that must be reached through the room in question, constitutes an obstacle that may interfere with the means of exit from the hotel in case of fire.

St. 1914, c. 795, which is the statute upon which you derive your authority in the premises, provides, in part, as follows: —

SECTION 13. In addition to the powers given by sections one to twelve, inclusive, the commissioner shall have power to make orders and rules relating to fires, fire protection and fire hazard binding throughout the metropolitan district, or any part of it, or binding upon any person or class of persons within said district, limited, however, to the following subjects: —

.
D. Causing obstacles that may interfere with the means of exit to be removed from floors, halls, stairways and fire escapes.

The fire escapes provided for the hotel constitute a necessary means of egress in case of fire. As the only means of egress to each of the fire escapes is through one of two lodging rooms, as above described, the door opening into the selected room, when locked or otherwise fastened, constitutes an obstacle which clearly interferes with the means of exit to said fire escapes.

When these doors are located upon floors of the hotel from which fire escapes are required by law, as they may prevent exit to the fire escapes from the halls and stairways of the

hotel, I am of the opinion that they constitute obstacles, within the meaning of St. 1914, c. 795.

In reaching this decision I do not pass upon the question whether or not, if these doors were provided with some ready means by which in case of fire a person on the outside could remove any fastening, and if the exit to the fire escape was clearly indicated, and notice posted how to open the door, this might constitute a sufficient means of access to the fire escape, within the purpose and intent of the statute.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Public Health — Common Drinking Cup.

The use of a common cup in communion services in churches is not a violation of St. 1910, c. 428, § 1.

MAY 3, 1920.

Dr. EUGENE R. KELLEY, *Commissioner of Public Health*.

DEAR SIR:— You ask my opinion whether or not the use of a common cup in giving communion in the Lutheran church would come under St. 1910, c. 428.

Section 1 of the act in question provides as follows:—

In order to prevent the spread of communicable diseases, the state board of health is hereby authorized to prohibit in such public places, vehicles or buildings as it may designate the providing of a common drinking cup, and the board may establish rules and regulations for this purpose.

It will be observed that no offence is committed by the use of a common cup unless the place of alleged violation has been designated by the department as a public place. The department has not so designated a church.

I believe that you might designate a church a public place in so far as to prevent the use there of a water tank with a cup hanging beside it, which is the sort of thing that the statute aimed at.

But as to communion, only a limited number of persons, who are duly qualified under church rules, participate therein. In my opinion, the communion is of a private rather than a public nature, and the use of the communion cup is not such a use as the Legislature had in mind when it gave to the State

Board of Health authority to prohibit the use of a "common drinking cup." A church may be a public place in the sense that its usual services are open to the public, but if communion service is participated in only by church members and others who may be admitted to the service, it may well be regarded as a ceremony of a private nature.

I may also direct your attention to the fact that not only may your department designate what shall be "public places, vehicles or buildings," within the meaning of the act, but that the statute is not mandatory, as it merely authorizes your department to take action in accordance with its terms.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Civil Service — Assistant Treasurer and Assistant Collector of
the City of Fall River.*

The appointment of a clerk as assistant treasurer or assistant collector for the city of Fall River, under the provisions of St. 1920, c. 80, is not subject to the civil service law and rules.

While a clerk so designated or appointed may be removed as assistant treasurer or assistant collector without reference to the Civil Service Law and Rules, the latter govern his removal from the position of clerk.

MAY 4, 1920.

PAYSON DANA, Esq., *Commissioner of Civil Service and Registration*.

DEAR SIR: — You ask my opinion upon the following case: —
St. 1920, c. 80, provides as follows: —

SECTION 1. The city treasurer and the city collector of the city of Fall River shall each appoint one of their male clerks as assistant treasurer and assistant collector, respectively. The said assistants shall, in cases which will not admit of delay, perform the duties and exercise the authority imposed or conferred by law or ordinance upon their respective chiefs, in case of their absence or disability, or of a vacancy in the office.

SECTION 2. The appointing officer shall in each case file notice of the appointment with the mayor and city clerk, and the appointment shall continue in force until revoked by the appointing officer.

The clerical force and employees in the aforesaid offices are classified under the civil service by St. 1913, c. 548. You ask: —

1. Is the appointment of an assistant treasurer and an assistant collector under St. 1920, c. 80, subject to the civil service law and rules?

2. If the answer to question 1 is in the affirmative, must a person properly appointed to and holding the position be discharged in accordance with the laws relating to the discharge of civil service employees?

1. St. 1920, c. 80, § 1, requires the city treasurer and the city collector to "appoint" one of their male clerks as assistant treasurer and as assistant collector, respectively. But such appointment carries no increase in salary. It imposes no regular duties upon the appointee. The appointee does not act except when the office is vacant or in case of the absence or disability of his chief. Even then he may not act except "in cases which will not admit of delay." See *Dimick v. Barry*, 211 Mass. 165. Moreover, under section 2 "the appointment shall continue in force until revoked by the appointing officer." The natural meaning of this provision is that the appointment is revocable at pleasure. Under these circumstances I am of opinion that the "appointment" does not operate as a promotion to an office, but is merely a designation of an employee to discharge the duties of the office in case of emergency. The situation differs from that presented by *Attorney-General v. Tillinghast*, 203 Mass. 539, where the appointment of an assistant auditor, to assist the auditor in his duties, was subject to confirmation by the city council. I am therefore constrained to advise you that neither the "appointment" nor the revocation thereof is within the provisions of the civil service law.

2. The answer to your second question follows from the first. Under St. 1913, c. 548, the civil service law and the rules and regulations established thereunder apply to the clerks and employees in the office of the collector of taxes and in the office of the city treasurer of Fall River. The status of the male clerk who may be "appointed" under St. 1920, c. 80, remains unchanged by that "appointment." He is a clerk still, and within the protection of the civil service so far as his clerkship is concerned. The revocation of the "appointment" terminates the authority to act in case of emergency, but leaves his status as clerk entirely unaffected.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Sunday Sports — Metropolitan Park System.

St. 1920, c. 240, which legalizes amateur sports on Sunday under certain conditions, applies not only to parks under the control of cities and towns, but also to those under control of the Metropolitan District Commission.

MAY 6, 1920.

JAMES A. BAILEY, Esq., *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You inquire whether St. 1920, c. 240, applies to parks under the control of the Metropolitan District Commission, successor, under Gen. St. 1919, c. 350, §§ 123 to 129, to the Metropolitan Park Commission. In this connection I have carefully considered the helpful memorandum submitted by Mr. Rogers.

St. 1920, c. 240, §§ 1, 2, 3 and 6, provide as follows: —

SECTION 1. In cities and towns which accept the provisions of this act it shall be lawful to take part in or to witness any amateur athletic outdoor sport or game on the Lord's Day between the hours of two and six in the afternoon as hereinafter provided.

SECTION 2. Such sports or games shall take place on such public playgrounds, parks or other places as may be designated for that purpose in a permit or license issued by the mayor and city council or body exercising similar powers in cities or by the selectmen in towns: *provided*, that if, under any statute or ordinance a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and *provided, further*, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

SECTION 3. The said sports or games shall be conducted subject to such regulations and restrictions as shall be prescribed by the mayor and city council or body exercising similar powers in cities and by the selectmen in towns, and the same shall be stated in the license or permit.

.

SECTION 6. The respective authorities described in section two may at any time and without previous notice revoke permits to conduct the said sports or games if they have reason to believe that any provision of this act, or any regulation or restriction prescribed under section three, is being or will be violated.

The statute makes lawful any amateur athletic outdoor sport or game on the Lord's Day between the hours of two

and six in the afternoon, "in cities and towns which accept the provisions of this act." It further authorizes the use of parks and public playgrounds for such sports, subject to license and regulation by the proper authorities. The metropolitan parks system is the great park system of the metropolitan district. It serves thirty-nine cities and towns. It is maintained for outdoor sport and recreation. The Legislature has introduced one geographical qualification into the act by limiting its operation to those cities and towns which accept its provisions. To except the metropolitan parks from its operation introduces a further geographical qualification which might unduly restrict the operation of the act in those cities and towns which accept it. If the Legislature had intended to make this further geographical qualification it would probably have done so by express words.

I find myself unable to concur in the suggestion that the language of the act is not broad enough to include the metropolitan parks system. Section 1 is certainly broad enough to apply thereto. Section 2, after providing for licenses by city or town officials, as the case may be, adds the following proviso: —

provided, that if, under any statute or ordinance a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority.

The words "any statute" can scarcely be restricted so as to exclude the statutes which place the metropolitan parks system under the exclusive charge of the Metropolitan District Commission.

I am unable to concur in the narrow and restrictive construction of St. 1920, c. 240, § 3, which is suggested.

St. 1893, c. 407, § 4, provides, in part, as follows: —

Said board shall have power to acquire, maintain and make available to the inhabitants of said district open spaces for exercise and recreation; . . . In furtherance of the powers herein granted, said board may employ a suitable police force, make rules and regulations for the government and use of the public reservations under their care, and for breaches thereof affix penalties not exceeding twenty dollars for one offence, to be imposed by any court of competent jurisdiction; and in general may do all acts needful for the proper execution of the powers and duties granted to and imposed upon said board by the terms of this act. . . .

This authority is transferred to the Metropolitan District Commission by Gen. St. 1919, c. 350, § 123. It is clearly broad enough to authorize regulation of sports and games in the metropolitan parks. *Brodline v. Revere*, 182 Mass. 595; *Whitney v. Commonwealth*, 190 Mass. 531; *Teasdale v. Newell & Snowling Cons. Co.*, 192 Mass. 440; I Op. Atty.-Gen., 598; II Op. Atty.-Gen., 56, 84, 292, 363, 376, 454; III Op. Atty.-Gen., 14, 96. I understand that for twenty-seven years week-day sports and games in the metropolitan parks have been regulated thereunder. I cannot believe that it is not broad enough to apply to the Sunday sports and games which are made lawful by St. 1920, c. 240. Section 2 of that act makes the Metropolitan District Commission the licensing authority for the metropolitan parks. Section 3 requires that the regulations or restrictions imposed "shall be stated in the license or permit." The case of *Teasdale v. Newell & Snowling Cons. Co.*, 192 Mass. 440, constrains me to the conclusion that it was not the intention of section 3 to withdraw the power to regulate Sunday sports in the metropolitan parks from the Metropolitan District Commission and to vest it in the city or town authorities as the case may be. If so, section 3 does not require a construction of section 2 which would exclude the metropolitan parks system.

The *Teasdale* case, *supra*, does not require such a narrow construction of St. 1920, c. 240. All that that case decided was that R. L., c. 102, § 69, did not subject the Metropolitan Park Commission, in its management of the parks as the representative of the State, to the regulating authority conferred by that statute upon local boards of health. It is not an authority for the proposition that St. 1920, c. 240, exempts the metropolitan parks system from a *legislative* enactment which is applicable to all other parks and relates to the use of them for the very purpose for which they were established, namely, outdoor sport and recreation. It is one thing to hold that the Legislature did not intend to subject the metropolitan parks to regulation by local boards of health; it is quite another to hold that a direct legislative regulation is not intended to apply to them. I am therefore constrained to advise you that in my opinion St. 1920, c. 240, is applicable to the metropolitan parks system.

To avoid misconception, however, let me add that St. 1920, c. 240, does not, in my opinion, impair the authority of the

Metropolitan District Commission to make reasonable regulations for the government of the parks and of Sunday sports therein. What is a reasonable regulation as applied to known facts is a question of law. *Whitney v. Commonwealth*, 190 Mass. 531, 535; *Commonwealth v. Plaisted*, 148 Mass. 375. Without in any way attempting to prejudge any case which may hereafter arise, I feel that the following suggestions may be helpful. The act is operative only in those cities and towns which accept it in the manner therein provided. For this reason Sunday sports which are within the scope of the act should not be permitted in those parks or portions of parks which lie within towns or cities which do not accept the act. Since the intent of the act is to legalize certain Sunday sports to the extent therein provided, regulations which would be reasonable with respect to similar sports on week days would seem to be equally applicable to such sports on Sundays. It is unnecessary to consider at the present time whether the possible presence of unusual crowds on Sundays, or other conditions peculiar to Sundays, would render special Sunday regulations reasonable and valid.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Insurance — Automobile Insurance — Discrimination — Rebates — Rate for One or More Automobiles — Floating, Open and Blanket Policies.

St. 1912, c. 401, § 1, providing, in part, that "no insurance company . . . shall pay or offer to pay or allow in connection with placing or attempting to place insurance any valuable consideration or inducement not specified in the policy . . . or any rebate of premium . . . or any special favor or advantage in the dividends or other benefits to accrue thereon . . ." prohibits an insurance company giving a lower rate to an insurant of several automobiles than to a person who insures a single automobile.

The issuance of the so-called floating, open and blanket policies to an automobile manufacturer, covering a large number of new automobiles, either in his factory, in warehouses or *in transitu*, is not prohibited by St. 1912, c. 401, § 1.

MAY 6, 1920.

HON. CLARENCE W. HOBBS, *Commissioner of Insurance*.

DEAR SIR:— You have requested my opinion upon the following question of law:—

It has been represented that certain insurance companies in connection with automobile insurance allow a person to insure a number of cars at a lower rate than a person who insures a single car. Your specific question is whether these facts constitute a violation of the provisions of St. 1912, c. 401, entitled "An Act to prohibit discrimination or rebates of premiums for policies issued by insurance companies other than life."

This act is a revision of St. 1908, c. 511, which is similarly entitled.

Section 1 of the 1912 act provides: —

No insurance company . . . shall pay or offer to pay or allow in connection with placing or attempting to place insurance any valuable consideration or inducement not specified in the policy contract of insurance, or any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon; or give, sell or purchase or offer to give, sell or purchase in connection with placing or attempting to place insurance anything of value whatsoever not specified in the policy.

The thought suggests itself, of course, that if an insurance company gives a lower rate to a person who insures, say, three or four automobiles than to a person who insures a single car, it does thereby give a special favor or advantage in the benefits to accrue thereon. The evil sought to be eliminated by chapter 401 is discrimination between individuals properly members of the same class. Generally speaking, a situation that results in an insurant obtaining in any way, directly or indirectly, an advantage over any other insurant of the same class is contrary to the provisions of chapter 401. Consequently, the giving of a lower rate to an insurant of several automobiles than to a person who insures a single car is prohibited by this statute.

On the other hand, it is my opinion that it was not intended that chapter 401 should prevent the further issuance of the so-called floating, open and blanket policies. The issuance of such insurance to an automobile manufacturer covering a large number of new automobiles, either in his factory, in warehouses, or *in transitu* in freight trains, and so on, is proper. The question of just where the line of demarcation between the two situations lies is a difficult one. Each case will have to be decided upon its own facts.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Department of Public Safety — Garage License — Appeal to Commissioner.

Under Gen. St. 1919, c. 350, § 109, an appeal lies to the Commissioner of Public Safety in respect of licenses to construct a garage and store gasoline therein, granted under the provisions of St. 1913, c. 452.

The system of appeals to the Commissioner of Public Safety created by Gen. St. 1919, c. 350, § 109, is not confined to licenses granted in the metropolitan district, under the provisions of St. 1914, c. 795, but also applies to licenses granted outside the metropolitan district under the provisions of St. 1913, c. 452.

MAY 6, 1920.

COL. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR:— You request my opinion upon the following facts:—

Under the provisions of St. 1913, c. 452, and amendments thereof and additions thereto, the city council of Lawrence granted a license for the construction of a garage in that city, and the chief of the fire department of said city, also acting under the provisions of said chapter 452, granted a permit for said garage, the chief of the fire department being the official designated for that purpose by the chief of the district police. Certain abutters have objected, and desire to appeal to you under the provisions of Gen. St. 1919, c. 350, § 109, which provides that—

Any person affected by an order of the department or of a division or office thereof, may, within such time as the commissioner may fix, which shall not be less than ten days after notice of such order, appeal to the commissioner, who shall thereupon grant a hearing, and after such hearing may amend, suspend or revoke such order. Any person aggrieved by an order approved by the commissioner may appeal to the superior court: *provided*, such appeal is taken within fifteen days from the date when such order is approved. The superior court shall have jurisdiction in equity upon such appeal to annul such order if found to exceed the authority of the department, and upon petition of the commissioner to enforce all valid orders issued by the department. Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy.

Your question is whether or not, under this section, you are obliged to grant a hearing to the objecting abutters.

St. 1914, c. 795, which applied to fire prevention and the storage of inflammable fluids in the metropolitan district

therein defined, provided by section 4 that the Fire Prevention Commissioner, created by the act, might delegate the granting of licenses and permits and certain other duties "to the head of the fire department or to any other designated officer in any city or town of the metropolitan district." In this respect the power of the Fire Prevention Commissioner of the metropolitan district resembled the powers conferred upon the detective and fire inspection department of the district police by St. 1904, c. 370, and acts in amendment thereof, including St. 1913, c. 452. But St. 1914, c. 795, § 18, further provided: —

The commissioner shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons, acting or purporting to act under authority of the commissioner, done or made or purporting to be done or made under the provisions of this act, and shall make all necessary and proper orders thereupon, and any person aggrieved by any such action of the head of a fire department or other person shall have an absolute right of appeal to the commissioner.

In an opinion rendered to you on Jan. 26, 1920, I advised you that this "absolute right of appeal to the commissioner," whose successor you are, under Gen. St. 1919, c. 350, §§ 99, 104, was preserved with respect to the metropolitan district by section 109, which is quoted above. St. 1904, c. 370, and amendments thereof, including St. 1913, c. 452, which originally applied to fire prevention throughout the Commonwealth but subsequently ceased to apply to the metropolitan fire district created by St. 1914, c. 795, contain no provision for appeal similar to St. 1914, c. 795, § 18, quoted above. The question is, therefore, whether Gen. St. 1919, c. 350, § 109, intended to continue this purely geographical discrimination.

Gen. St. 1919, c. 350, §§ 99, 100, created the Department of Public Safety, under the supervision and control of a Commissioner of Public Safety, abolished not only the district police force, including the detective and fire inspection department of the district police, but also the Fire Prevention Commissioner of the metropolitan district, and transferred to the Department of Public Safety the rights, powers, duties and obligations of the district police and of other boards and offices so abolished. Section 101 provides that the Department of Public Safety shall be organized in three divisions,

one of which shall be the division of fire prevention, under charge of a director to be known as State Fire Marshal. Section 104 provides that such director shall have the powers and perform the duties of the Fire Prevention Commissioner of the metropolitan district, and also the duties of the district police and of the deputy chief of the detective and fire inspection department under certain statutes with respect to the keeping and storing of inflammable liquids and combustible compounds. The general effect of these provisions is to place the duties imposed by law with respect to fire prevention upon the Department of Public Safety, which operates throughout the Commonwealth.

Under these circumstances, I am of the opinion that the Legislature did not intend, by Gen. St. 1919, c. 350, § 109, to grant a system of appeal to the commissioner which should operate only within the former metropolitan fire district, and to deny that same system of appeal to the rest of the Commonwealth. Accordingly, I advise you that you are required to grant a hearing to the abutters in the instant case.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Commonwealth — Department of Public Works — Commissioners — Retirement Association — Employees.

The provisions of the retirement act, St. 1911, c. 532, do not apply to the commissioners constituting the Department of Public Works.

MAY 8, 1920.

HON. JOHN N. COLE, *Commissioner of Public Works*.

DEAR SIR: — You have requested my opinion as to whether or not you and your four associate commissioners, constituting the Department of Public Works, are members of the Retirement Association as provided for by St. 1911, c. 532, and subsequent amendments.

Paragraph (c) of section 1 of said chapter 532, as amended by St. 1912, c. 363, provides that —

The word “employees” means permanent and regular employees in the direct service of the commonwealth or in the metropolitan district service, whose only or principal employment is in such service.

Among the rulings made by the Board of Retirement is the following, numbered 4: —

Officials appointed by the Governor for definite terms are "permanent and regular employees," and if their "only or principal" employment is in the service of the Commonwealth, they become members of the Retirement Association.

Paragraph (4) of section 4 of said chapter 532 provides, in part, that the "board of retirement shall have power to make by-laws and regulations not inconsistent with the provisions of this act."

The construction of a constitution or a statute is a judicial question. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327; *Cambridge v. Boston*, 130 Mass. 357. Neither Congress nor the Legislature can modify a constitutional provision by a statute which purports to declare its meaning. *Kinneen v. Wells*, 144 Mass. 497; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327; *Eisner v. Macomber*, 252 U. S. 189. Clearly, the Board of Retirement cannot by rule change the meaning of the word "employees," as used in St. 1912, c. 363. In determining the meaning of the word "employees" the rule adopted by the Board must, therefore, be laid on one side.

Our decisions recognize a distinction between a public office and a public employment. *Attorney-General v. Drohan*, 169 Mass. 534; *Attorney-General v. Tillinghast*, 203 Mass. 539. The word "employee" may be used in a sense which includes "officers." Opinion of Attorney-General Allen to the Metropolitan District Commission, Feb. 4, 1920. It may be used in a restrictive sense, so as to exclude them. Opinion of Attorney-General Wyman to E. Leroy Sweetser, Dec. 16, 1919. To such a word the language of Mr. Justice Holmes in *Towne v. Eisner*, 245 U. S. 418, 425, is peculiarly applicable:—

A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used.

Officials appointed by the Governor, with the advice and consent of the Council, who exercise some part of the sovereign power, are "officers" who are not within the scope of the word "employee" when used in its restrictive sense. Opinion of Attorney-General Wyman to E. Leroy Sweetser, *supra*; *Attorney-General v. Tillinghast*, 203 Mass. 539. In determining whether the word "employee," as used in this act, was intended to include such officers, regard must be had to the

purpose which the act was intended to accomplish. *Holy Trinity Church v. United States*, 143 U. S. 457, 459-462.

St. 1911, c. 532, and amendments thereof, established a contributory retirement system for the several employees of the Commonwealth, the fundamental idea of which is that one-half of the retirement allowance shall be purchased by the savings of the employee, which have been deducted from his salary during the term of his employment, and one-half shall be contributed by the Commonwealth. The purpose was to establish a pension system containing provision for contribution by the employee, and to have the pension become effective after a protracted service for the Commonwealth, in one case where a member reaches the age of sixty years and has been in the continuous service of the Commonwealth for fifteen years preceding his retirement, and in another case where a member has completed a period of thirty-five years of continuous service. There is also, of course, the provision that any member who reaches the age of seventy must retire.

In the case, however, of yourself and your four associate commissioners you are appointed to your official positions by the Governor, with the advice and consent of the Council, for short and definite terms of a few years. In my opinion, the provisions of the retirement act do not apply to your situation, as it is apparent that almost without exception members of such a Commission serve the Commonwealth but temporarily, and return to private life long before they reach the advanced age of sixty or seventy years, and before they have completed thirty-five years of continuous service.

If the provisions of the retirement act did apply to you and your associate commissioners, it would mean that you would make your contributions over a short period of time, and, upon ceasing to be a member of the department, would receive a refund of the money paid in, with the interest earned thereon. Under these circumstances, the Commonwealth would be acting as an institution for savings, and, in my judgment, this was not intended by the establishment of the retirement system. I have come to this conclusion despite an opinion to the contrary by one of my predecessors in office. See IV Op. Atty.-Gen. 105.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Division of Registration in Medicine — Right to Summon —
Felony outside of Practice of Medical Profession.*

The Division of Registration in Medicine has a right, under the provisions of Gen. St. 1917, c. 55, § 1, to summon before it a registered physician who has been convicted of a felony committed by him outside of the practice of his profession.

MAY 8, 1920.

WALTER P. BOWERS, M.D., *Secretary, Division of Registration in Medicine,
Department of Civil Service and Registration.*

DEAR SIR: — You request my opinion as to whether your Board has a legal right to summon before it, under the provisions of Gen. St. 1917, c. 55, § 1, a registered physician who has been convicted of perjury in connection with testimony given by him at a court hearing on a motion for alimony for his wife, in view of said conviction being of a felony committed by him outside of the practice of his profession.

Gen. St. 1917, c. 55, § 1, so far as it applies to your inquiry, provides as follows: —

. . . Said board, after hearing, may by unanimous vote revoke any certificate issued by it and cancel the registration of any physician who has been convicted of a felony or of any crime in the practice of his profession . . .

By the use of the word “felony” and the words “any crime,” and from the construction of the language used, “in the practice of his profession”, which modifies the words “any crime” and has no relation to, or bearing on, the word “felony”, it is quite clear that the Legislature intended that the provisions of said section 1, as above quoted, shall apply to the conviction of registered physicians of crimes committed both outside of and in connection with the practice of their profession. In case of the former, the conviction is limited to a felony, but in the latter case the conviction may be for either a felony or a misdemeanor.

Had the Legislature intended to limit the application of the provisions of said section, as above quoted, to a conviction of a physician of a crime committed solely in the practice of his profession, it would have had no occasion to use the word “felony,” inasmuch as said word is included within the statutory definition of the words “any crime.”

R. L., c. 215, § 1, provides: —

A crime which is punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

I am therefore of the opinion that though the felony of which the physician was convicted was committed outside of the practice of his profession, your Board has the right to summon the physician before it for a hearing, and may, upon a unanimous vote, either revoke his certificate or cancel his registration.

I desire to direct your attention to Gen. St. 1918, c. 257, § 285, which amends the present provisions of Gen. St. 1917, c. 55, § 1, by striking out said section and substituting therefor a new section, in which the words “or of any crime in the practice of his profession” do not appear. This amendment is to take effect on Feb. 1, 1921.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

*Insurance — Mutual Fire Insurance — Premium Charge —
Deposit Notes — Excepted Companies.*

A mutual fire insurance company may not conduct in this Commonwealth the system of business outlined in St. 1907, c. 576, § 49, unless it not only was organized prior to May 21, 1887, but also was lawfully doing business upon the plan set forth in said section 49 at the time St. 1907, c. 576, took effect, namely, July 28, 1907.

MAY 12, 1920.

HON. CLARENCE W. HOBBS, *Commissioner of Insurance*.

DEAR SIR: — You request my opinion upon the following question of law: —

St. 1907, c. 576, § 48, provides, in part: —

Mutual fire insurance companies, except as provided in the following section, shall charge and collect upon their policies a full mutual premium in cash, or notes absolutely payable.

Section 49 provides: —

Mutual fire insurance companies organized prior to the twenty-first day of May in the year eighteen hundred and eighty-seven and now

lawfully doing business upon the plan of taking deposit notes for a percentage of the amount insured by its policies, and making a call or assessment thereon for expenses and for the payment of losses only after such losses are incurred, may continue such system of business, and such deposit notes shall constitute the entire liability of their members.

A company is seeking admission to this Commonwealth which does business upon the plan outlined in section 49, and is also allowed under its charter to issue policies for a cash premium but without the features peculiar to mutual insurance companies of dividends or liability for assessment. This company was organized prior to the twenty-first day of May, 1887.

Your specific questions are as follows: —

1. Can the company, in view of sections 48 and 49, be admitted, inasmuch as the character of its insurance is such that a domestic mutual company could not be organized to write business in the same manner?

2. Does the fact that this company was organized prior to the twenty-first day of May in the year 1887 make it possible to admit it to this Commonwealth under the provisions of section 49?

My answer to both of your questions is in the negative. Unless a mutual fire insurance company is doing business as set forth in section 48, namely, charging and collecting upon its policies a full mutual premium in cash, or notes absolutely payable, it cannot be admitted unless it falls within the exceptions set forth in section 49. The company must not only have been organized prior to the twenty-first day of May, 1887, but also lawfully doing business upon the plan therein set forth at the time said St. 1907, c. 576, took effect, namely, July 28, 1907. In my opinion, the words "now lawfully doing business" are to be construed to mean lawfully doing business on that date within the Commonwealth of Massachusetts.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

*Salaries of Officers and Employees of the Commonwealth —
Increases — Deputy Supervisor of Administration.*

Under Gen. St. 1919, c. 320, § 1, recommendations for increases in the salaries of all officers and employees who are within the provisions of Gen. St. 1918, c. 228, § 1, except those whose salaries are or shall be fixed by statute, must be presented in the first instance to the Supervisor of Administration.

Gen. St. 1919, c. 320, § 1, repeals by implication provisions of prior statutes which require increases to be approved by the Governor and Council.

The provision of Gen. St. 1916, c. 296, § 2, which authorizes the Supervisor, with the consent of the Governor and Council, to appoint a deputy or deputies, and to determine their salaries, is so modified by Gen. St. 1919, c. 320, § 1, that the Supervisor has the power to increase the salary of a deputy without consent of the Governor and Council.

It is suggested that the Supervisor, in formulating rules and regulations, may include some provision for submitting certain increases for the approval of the Governor and Council.

MAY 12, 1920.

MR. THOMAS W. WHITE, *Supervisor of Administration.*

DEAR SIR: — You have requested my opinion as to whether an increase in salary for your deputy, for which a sufficient appropriation has been made, must be approved by the Governor and Council before becoming effective.

Gen. St. 1916, c. 296, § 1, abolished the Commission on Economy and Efficiency and the State Board of Publication, and transferred the rights, powers, duties and obligations of both said Commission and said Board to the Supervisor of Administration established by said act. Section 2 provides, in part: —

The supervisor . . . , with the consent of the governor and council, may appoint a deputy or deputies and determine their salary and duties except as is otherwise hereinafter provided. Any deputy may be removed for cause by the supervisor with the consent of the governor and council. The supervisor may also appoint a secretary and such experts, clerks and other assistants, and may pay them such salaries and may incur such other expenses, including traveling expenses, not exceeding such sums as may be appropriated therefor by the general court, as he may deem necessary and proper, subject, however, to the approval of the committee on finance of the council or of the governor and council where such approval is required by law.

Section 3 provides, in part, as follows: —

The committee on finance of the council shall act as a board of advisers of the supervisor and shall hear appeals from the decisions of said officer as provided in this act. . . .

Gen. St. 1918, c. 228, §§ 1 and 2, provide as follows: —

SECTION 1. All appointive offices and positions in the government of the commonwealth, except those in the judicial and legislative branches, shall be classified by the supervisor of administration, subject to the approval of the governor and council, in services, groups and grades according to the duties pertaining to each office or position. Such classification shall be established by specifications defining for each grade the titles, duties and responsibilities, and minimum qualifications for entrance and promotion. The titles so designated shall be the official title of positions included therein, and shall be set forth on all pay rolls. The term "group" as used in this act and in said classification shall be construed to include positions in a separate profession, vocation, occupation or trade involving a distinctive line of work which requires special education, training or experience. The term "grade" shall be construed to mean a subdivision of a group, and to include all positions with substantially identical authority, duties and responsibility as distinct from all other grades in that group. The term "advancement" shall be construed to mean an increase from one salary rate to another salary rate within a grade. The term "promotion" shall be construed to mean a change from the duties of one grade to the duties of a higher grade, and shall involve a change in salary to the rates of the higher grade.

SECTION 2. The supervisor of administration shall have authority to make rules and regulations, subject to the approval of the governor and council, providing for the application and administration of the classification and the specifications established under the provisions of this act.

Gen. St. 1919, c. 320, struck out section 3 of Gen. St. 1918, c. 228, and substituted therefor a section reading, in part, as follows: —

Recommendations for increases in the salaries of officers and employees of the commonwealth who are subject to the provisions of this act, except officials and employees whose salaries are now or shall be regulated by statute, shall be submitted in the first instance to the supervisor of administration, and if approved by him shall take effect upon notice by the supervisor to the civil service commission and the auditor of the commonwealth. If the supervisor does not approve a proposed increase in salary, he shall report the

recommendation of the department or institution with his own recommendation to the governor and council whose decision shall be final, except that the governor and council shall not grant an increase in salary greater than that recommended by the department or institution. Increases in salaries granted under the provisions of this section shall conform to such standard rates as may be established by rule or regulation in accordance with the provisions of section two. No increase in salary shall be granted under the provisions of this section unless an appropriation sufficient to cover such increase has been granted by the general court in accordance with estimates for the budget filed as required by law. . . .

Gen. St. 1919, c. 350, § 15, provides: —

The office of supervisor of administration, existing under authority of chapter two hundred and ninety-six of the General Acts of nineteen hundred and sixteen, and acts in amendment thereof and in addition thereto, shall continue to be under the governor and council, as now provided by law.

The meaning of these statutes is by no means clear. Apparently, Gen. St. 1919, c. 320, § 1, is intended to apply to all officers or employees who are to be classified under Gen. St. 1918, c. 228, § 1, "except officials and employees whose salaries are now or shall be regulated by statute." The word "regulated" in this phrase must, in my opinion, be held to mean "fixed." In a broad sense the classification prescribed by Gen. St. 1918, c. 228, § 1, is a regulation by statute. If the word "regulated" be construed broadly enough to include such a regulation, it would insert an exception which is as broad as the statute, and in effect make the act nullify itself. I am therefore of opinion that recommendations for increases in the salaries of all officers and employees who are within the provisions of Gen. St. 1918, c. 228, § 1, except those whose salaries are or shall be fixed by statute, either in some definite sum or by a sliding scale which is automatically effective, must be presented "in the first instance" to the Supervisor of Administration. Such increases become effective if and when the Supervisor notifies the Civil Service Commission and the Auditor.

It is true that this construction apparently repeals by implication that provision of statutes enacted *prior* to Gen. St. 1919, c. 320, which requires increases, in certain cases, to be approved by the Governor and Council. On the other hand,

Gen. St. 1919, c. 350, which is *subsequent* to Gen. St. 1919, c. 320, restores this provision in a number of instances. The result is that Gen. St. 1919, c. 320, supersedes this provision in prior statutes, but, of course, yields to subsequent statutes which restore it.

On the other hand, the provision that recommendations for increases which are within the scope of Gen. St. 1919, c. 320, shall be submitted "in the first instance" to the Supervisor of Administration does not necessarily require that he shall pass upon the increase without recourse to the Governor and Council. The classification required by Gen. St. 1918, c. 228, § 1, is to be approved by them. Under section 2 of the same act the rules and regulations for the application and administration of such classification are likewise subject to their approval. Moreover, under Gen. St. 1916, c. 296, § 3, the finance committee of the Council acts as a board of advisers to the Supervisor. Clearly, there is nothing in the act which prevents the Supervisor from consulting the finance committee as to the propriety of any increase upon which he is to pass "in the first instance." It may well be that rules and regulations might be adopted which require him to submit recommendations for increases in certain classes of cases to the Governor and Council before he acts thereon. In a word, the authority to make rules and regulations with the approval of the Governor and Council affords an opportunity for clarifying certain obscurities in the act.

The provision of Gen. St. 1916, c. 296, § 2, which authorizes the Supervisor, with the consent of the Governor and Council, to appoint a deputy or deputies, and to determine their salaries, is, in my opinion, so modified by Gen. St. 1919, c. 320, § 1, that the Supervisor has power to increase the salary of such deputy without submitting the increase to the Governor and Council, provided, of course, that the other provisions of the latter section are complied with.

It is to be borne in mind, however, that when this power was conferred on the Supervisor the General Court had previously provided, in Gen. St. 1918, c. 228, that rules and regulations made by the Supervisor, providing for the application and administration of the classification and specifications established under the provisions of that act, should be subject to the approval of the Governor and Council, and that section 3 of chapter 296 of the General Acts of 1916, making the

committee on finance of the Council a board of advisers of the Supervisor, was continued in full force and effect. How far the Supervisor should seek the advice of the committee on finance in the matter of salary increases is left by the statute undetermined, and may well be the subject of mutual consideration and agreement by the Supervisor and the finance committee. The office of deputy in your department is one conferring executive and managerial duties upon the incumbent. It may well be that, in formulating rules and regulations under the provisions of Gen. St. 1918, c. 228, some provision might be included for submitting for the approval of the Governor and Council increases in salary of those officials who exercise executive or managerial functions.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Taxation — Franchise Tax on Domestic Corporation — Deductions — Mortgage of Real Estate held as Collateral Security.

The value of a real estate mortgage held by a domestic corporation as collateral security for a debt due to it is not to be deducted, under St. 1909, c. 490, pt. III, § 41, cl. 4th, in determining the franchise tax upon such corporation, assuming that the corporation has paid no local tax upon such mortgage.

MAY 13, 1920.

Hon. W. D. T. TREFRY, *Commissioner of Corporations and Taxation*.

DEAR SIR: — You have asked my opinion as to whether a deduction under the provisions of St. 1909, c. 490, pt. III, § 41, cl. 4th, should be permitted to a corporation on the following state of facts.

A Massachusetts corporation holds as collateral security for a loan a mortgage on Massachusetts real estate. The mortgagee is the borrower from the corporation, and the mortgagor has nothing to do with the transaction.

St. 1909, c. 490, pt. III, § 41, cl. 4th, reads as follows: —

In case of corporations subject to the requirements of the preceding section, other than railroad corporations, telegraph, telephone, street railway and electric railroad companies, whether chartered or organized in this commonwealth or elsewhere, and of domestic business corporations, the value as found by the tax commissioner of their works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation wherever situated.

For the purposes of this section the tax commissioner may take the value at which such works, structures, real estate, machinery, poles, underground conduits, wires and pipes are assessed at the place where they are located as the true value, but such local assessment shall not be conclusive of the true value thereof.

In *Firemen's Fire Ins. Co. v. Commonwealth*, 137 Mass. 80, the court decided that in figuring the franchise tax the Tax Commissioner should deduct from the aggregate value of the shares of the corporation the value of mortgages of real estate held by it and subject to local taxation; and later, in *Brooks v. West Springfield*, 193 Mass. 190, at p. 194, the court, in discussing this case says: —

Our system of taxation is purely statutory, and the conditions which underlie the exemption are plainly stated. They are, that the debt must be secured by a mortgage of realty, and that the mortgagee's interest must be taxed as real estate.

In *Firemen's Fire Ins. Co. v. Commonwealth*, *supra*, the court, at p. 81, states: —

Pub. Sts., c. 13, §§ 39-41. The whole scope of these provisions shows that the object of the Legislature, in requiring the deduction from the aggregate value of the shares named in section 40, was to prevent double taxation in fact if not in form, and to insure that property of a corporation which, under the laws, was subject to local taxation, should not be included in the valuation upon which the excise on the franchise is based.

Applying these tests to the case submitted, I am of the opinion that a deduction for mortgages given as collateral should not be allowed. While it might be said that such a mortgage is held by the corporation, it is not held within the meaning of the decisions, as a mortgage held as collateral has no necessary relation to an investment in real estate, and it is not property of the lender, who holds such mortgage merely as collateral. The object of the exemption granted is to avoid double taxation, and such exemption must be strictly construed.

By St. 1909, c. 490, pt. I, §§ 16 and 18, it is provided that a mortgage "given to secure the payment of a fixed and certain sum of money . . . shall be assessed as real estate . . . ; and the mortgagor shall be assessed only for the value of such real estate after deducting the assessed value of the interest therein of such mortgagee." For the purpose

of taxation mortgagors and mortgagees are deemed joint owners until the mortgagee takes possession, but section 17 permits the assessment of the entire tax to the mortgagor unless a statement in regard to the mortgage is filed; and as a matter of practice this method is always followed, and the mortgagee, if a corporation, is amply protected against double taxation by the decision in *Firemen's Fire Ins. Co. v. Commonwealth, supra*. In answering your query I have assumed that the corporation to whom the mortgage is pledged as collateral pays no local tax on such mortgage.

To extend the corporate mortgagee's deduction to a corporation holding mortgages as collateral would not be justified as avoiding double taxation, because it would give to such corporation not a proper deduction but a real exemption, based not on the loan but on the amount of the collateral, which is not the property of the corporation. By continually pledging and repledging a mortgage as collateral, total tax deductions of many times the face of the mortgage could be secured by successive corporate creditors. A construction permitting this result is not to be entertained unless clearly implied, and the wording of the statute does not require such a construction.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Metropolitan District Commission — Power to adopt Regulations prohibiting Discharge of Gasoline into Metropolitan Sewer System.

The Metropolitan District Commission, created by Gen. St. 1919, c. 350, §§ 123-129, has authority to adopt reasonable regulations forbidding the discharge of gasoline from local sewers into the metropolitan sewer system, which regulations, if reasonable, may be enforced in equity.

MAY 14, 1920.

JAMES A. BAILEY, Esq., *Commissioner, Metropolitan District Commission*.

DEAR SIR:—You request my opinion upon the following question:—

What department, board, commission or public authority—state, municipal or otherwise—has the power, authority and duty to prevent gasoline from entering city and town sewers which are connected with and empty into metropolitan sewers?

In relation to the power and duty of the Metropolitan District Commission, which, under Gen. St. 1919, c. 350, §§ 123-129, succeeded to the rights, powers, duties and obligations of the Metropolitan Water and Sewerage Board, existing under St. 1901, c. 168, and acts in amendment thereof and in addition thereto, you refer me to the following statutes:—

St. 1889, c. 439, § 1, created a board to be known as the Metropolitan Sewerage Commissioners. Section 3 provided that said board should “construct, maintain and operate” for Boston and certain other designated cities and towns “such main sewers and other works as shall be required for a system of sewage disposal for said cities and towns”; and also “another such system” for Boston and certain other named cities and towns. Sections 9 and 16 further provided as follows:—

SECTION 9. Any city or town within whose limits any main sewer shall have been constructed under the provisions of this act shall connect its local sewers with such main sewer, subject to the direction and control of said board, and any person, firm or corporation may, subject to the direction, control and regulation from time to time of said board, and subject to such terms, conditions and regulations as each city or town may prescribe, connect private drains with said main sewer.

SECTION 16. The supreme judicial court shall have jurisdiction in equity to enforce the provisions of this act, and shall fix and determine the compensation of all commissioners appointed by said court under the provisions hereof.

St. 1895, c. 406, provided that said board should construct a system of sewage disposal for the Neponset River Valley. Sections 9 and 21 of said act contain provisions similar to sections 9 and 16 of St. 1889, c. 439.

St. 1899, c. 424, provided that said board should construct a high level gravity sewer for the relief of the Charles and Neponset River Valleys. Section 8 contains provisions similar to those in St. 1889, c. 439, § 9, and further provides:—

The sewerage systems of all drainage areas not now drained by the south metropolitan system, which are constructed after the passage of this act, shall be constructed in accordance with the so-called separate system of sewerage.

Section 21 is similar to section 16 of St. 1889, c. 439.

Gen. St. 1915, c. 150, amends St. 1889, c. 439, § 9, so as to read as follows: —

Any city or town within whose limits any main sewer shall have been constructed under the provisions of this act shall connect its local sewers with such main sewer, subject to the direction, control and regulation of said board, and any person, firm or corporation may, subject to the direction, control and regulation from time to time of said board, and subject to such terms, conditions and regulations as each city or town may prescribe, connect private drains with said main sewer.

Gen. St. 1915, c. 147, makes a similar amendment to St. 1899, c. 424, § 8.

Where statutes are parts of a general system relating to the same class of subjects, and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish. *Hyde v. Fall River*, 189 Mass. 439, 441; *Sheldon v. Boston & Albany R.R.*, 172 Mass. 180, 182. The statutes referred to above fall within this principle. St. 1901, c. 168, abolished the metropolitan sewerage commissioners and transferred all their powers, rights, duties and liabilities to the Metropolitan Water and Sewerage Board. Gen. St. 1919, c. 350, § 123, abolished the Metropolitan Water and Sewerage Board and transferred all its rights, powers, duties and obligations to the Metropolitan District Commission created by that act. Section 127 of that act further provides: —

The commission shall have and exercise over the public property hereby transferred to its charge and control from the metropolitan water and sewerage board, in addition to the power and authority of said board, all the power and authority which the metropolitan park commission has over open spaces for exercise and recreation under chapter four hundred and seven of the acts of eighteen hundred and ninety-three, and acts in amendment thereof and in addition thereto, so far as such power and authority may be exercised consistently with the purposes for which the metropolitan water and sewerage systems were created and are maintained.

In my opinion, the Metropolitan District Commission has authority to adopt reasonable regulations forbidding the discharge of gasoline into the metropolitan sewer system. See *Commonwealth v. Whitney*, 190 Mass. 531, 535; *Teasdale v.*

Newell & Snowling Cons. Co., 192 Mass. 440, 442. Under St. 1889, c. 439, § 16, St. 1895, c. 406, § 21, and St. 1899, c. 424, § 21, such regulations, if reasonable, may be enforced in equity. But this authority does not confer jurisdiction over the local sewers which are connected with the metropolitan system. Jurisdiction over the local sewers is vested in that public body which is charged by law with the duty to make and maintain them. R. L., c. 49, §§ 1-36. R. L., c. 49, §§ 12 and 36, provide: —

SECTION 12. The mayor and aldermen of a city and the sewer commissioners, selectmen or road commissioners of a town may lay, make and maintain particular sewers from common sewers to the street line, which shall be the property of the city or town. The owner of any land benefited thereby shall pay to the city or town for the permanent privilege of using the same, such reasonable amount as said boards determine, which may be fixed at the estimated average cost of all such particular sewers within the territory for which a system of sewers has been built or adopted. Said boards may, upon request of the owner of land and payment by him of the actual cost thereof, construct a particular sewer from the street line to a house or building; and may make regulations for the construction and use of all particular sewers and impose penalties not exceeding twenty dollars for their violation.

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SECTION 36. The superior court shall have jurisdiction in equity to restrain the use of the public sewers or the placing or depositing of any materials therein or the making of any unlawful connections therewith.

Thus, R. L., c. 49, §§ 12 and 36, appear to confer upon the proper authorities of a city or town a control over local sewers similar to that exercised by the Metropolitan District Commission over the metropolitan sewerage system. If, therefore, a city or town should persist in discharging gasoline into the metropolitan sewerage system through the local sewers, in defiance of a reasonable regulation of the Metropolitan District Commission forbidding such discharge, the Metropolitan District Commission would have an immediate remedy in equity against the municipal offender, and the proper municipal authority could in turn invoke against the individual offender both the penalty authorized by R. L., c. 49, § 12, and the equitable remedy conferred by R. L., c. 49, § 36. Whether the Metropolitan District Commission could in case of per-

sistent violation by the municipal authority proceed to seal up the offending local sewer at the point where it joins the metropolitan system, and whether the municipal authority could in turn proceed to seal the particular sewer of a persistent individual offender, need not now be decided.

It may be, also, that with the co-operation of the Commissioner of Public Safety another remedy might be had directly against the individual offender. St. 1904, c. 370, § 2, as amended by St. 1905, c. 280, § 1, provides as follows:—

The detective and fire inspection department of the district police may make regulations, except as hereinbefore provided, for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, except fireworks and fire crackers, and may prescribe the materials and construction of buildings to be used for any of the said purposes.

Section 3 of said chapter 280 provides, in case of violation of such regulation, for a fine of not more than \$100 or for imprisonment for not more than one month, or for both such fine and imprisonment.

In my opinion, a regulation forbidding the use or storage of gasoline in such a manner as to permit it to get into the sewers would be valid. Violation of such a regulation would bring the offender within the penalty provided by section 3.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Bank Commissioner — Taking Possession of Bank — Liquidation or Resumption of Business.

Under St. 1910, c. 399, as amended, the Bank Commissioner has an option whether to proceed to liquidate the affairs of a bank of which he has taken possession, or to allow it to resume business.

Unless and until the Bank Commissioner decides to liquidate, he is not required to make and file an inventory of assets, to give notice in regard to proof of claims, or to file in court lists of claims as provided in sections 7, 8 and 9.

MAY 21, 1920.

MR. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR:— In 1919 the then Bank Commissioner, acting under the authority conferred by St. 1910, c. 399, took pos-

session of the property and business of the Old South Trust Company. He made no decision as to whether the trust company should be liquidated or allowed to resume business, and as yet you have not decided this question. You desire to know, prior to making such decision, (1) whether you should file an inventory of assets with the clerk of the Supreme Judicial Court; (2) whether you should file a list of claims with the clerk of the Supreme Judicial Court; (3) whether you should publish and mail notices in regard to claims.

St. 1910, c. 399, entitled "An Act relative to proceedings against and the liquidation of delinquent corporations and individual bankers subject to the supervision of the Bank Commissioner," as amended by St. 1912, c. 472, and by St. 1913, c. 177, provides in section 2, in part: —

Whenever it shall appear to the bank commissioner that any bank under his supervision . . . is conducting its business in an unsafe . . . manner, . . . the bank commissioner may take possession forthwith of the property and business of such bank and may retain possession thereof until the bank shall resume business or until its affairs shall finally be liquidated as herein provided. . . .

Section 3 provides, in part, as follows: —

. . . Such bank may, with the consent of the bank commissioner, resume business upon such conditions as he may approve: *provided, however*, . . . he may retain in behalf of the bank the control, prosecution or defence of any undetermined suits or claims brought in behalf of or against the bank under the provisions of section five of this act during the time when the bank was in his charge, . . .

Section 7 is as follows: —

Upon taking possession of the property and assets of such bank, the bank commissioner shall make an inventory of the assets of the bank in duplicate, one to be filed in the office of the bank commissioner and one in the office of the clerk of the supreme judicial court for the county in which the principal office of the bank is located.

Section 8 is as follows: —

The bank commissioner shall cause to be published weekly for three consecutive months, in such newspapers as he may direct, a notice calling on all persons who may have claims against such bank to present the same to the bank commissioner and to make legal proof thereof at a place and in a time, not earlier than the last day of publi-

cation, to be therein specified. The bank commissioner shall mail a similar notice to all persons whose names appear as creditors upon the books of the bank, so far as their addresses are known. If the bank commissioner doubts the justice and validity of any claim, he may reject the same and serve notice of such objection upon the claimant either by mail or person. An affidavit of service of such notice, which shall be prima facie evidence thereof, shall be filed with the bank commissioner. An action upon the claim so rejected shall not be entertained unless brought within six months after such service. Claims presented after the expiration of the time specified in the notice to creditors shall be entitled to share in the distribution only to the extent of the assets in the hands of the bank commissioner equitably applicable thereto.

Section 9 is as follows: —

Upon the expiration of the time fixed for the presentation of claims, the bank commissioner shall make in duplicate a full and complete list of the claims presented, including and specifying such claims as have been rejected by him. One of said lists shall be filed in the office of the bank commissioner and the other in the office of the clerk of the supreme judicial court for the county in which the principal office of the bank is located. Thereafter the bank commissioner shall make and file in said offices, at least fifteen days before every application to the court for leave to declare a dividend, a supplementary list of the claims presented since the last preceding list was filed, including and specifying such claims as have been rejected by him, and, in any event, he shall make and file the said list at least once in every six months after the filing of the original list, so long as he shall remain in possession of the property and business of the bank. Said inventory and said list shall be open to inspection at all reasonable times.

Sections 10 and 11 relate to matters arising only out of liquidation of a bank. Section 14 deals with liquidation of a bank by vote of the stockholders. Section 15 provides the method for dealing with dividends and unclaimed deposits remaining after the order for final distribution. Section 16 gives the Supreme Judicial Court jurisdiction in equity to enforce the provisions of the act. Section 17 repeals sections 9, 10 and 11 of chapter 590 of the Acts of 1908.

Reading the act as a whole, it is evident that most of its provisions deal with the duties and authority of the Bank Commissioner after he has started to liquidate the affairs of the bank. In section 2, however, the Bank Commissioner is given power to retain possession until the bank shall resume

business, and section 3 also mentions the possibility of the bank resuming business. These are the only two references to resumption of business, and, as our Supreme Court said in *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207, at p. 209 —

Whether these will be resumed or the corporation be extinguished is matter of doubt, although the main part of the provisions of said chapter 399 look toward final liquidation.

The first sentence of section 4 is as follows: —

Upon taking possession of the property and business of such bank, the bank commissioner shall have authority to collect moneys due to the bank, and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate its affairs as *hereinafter provided*.

This sentence does not impose a duty on the Bank Commissioner to liquidate the affairs of the bank, as he is specifically given an option, under section 2, whether he shall proceed to liquidation or allow a bank to resume business. But the sections following section 4, which compose the main body of the act, deal primarily with liquidation. The Bank Commissioner may take possession of the bank's property and business without any court action, but he cannot liquidate the affairs of the bank without going to the Supreme Judicial Court. There can be no question that unless there is a liquidation, sections 8 and 9 impose upon the Bank Commissioner the duty of doing vain acts, as it would be foolish to give notices in regard to proof of claims and to file in court lists of claims presented unless such claims would be paid, and unless your duties in respect to the bank made it incumbent on you to take court action. Until and unless you decide to liquidate the affairs of the bank, the provisions of sections 8 and 9 do not control your conduct.

The construction of section 7 is more difficult. That section provides as follows: —

Upon taking possession of the property and assets of such bank, the bank commissioner shall make an inventory of the assets of the bank in duplicate, one to be filed in the office of the bank commissioner and one in the office of the clerk of the supreme judicial court for the county in which the principal office of the bank is located.

If you were to proceed to liquidation you would act under this section. The question is whether you must follow its provisions before you have made a decision as to whether the bank is to liquidate or to resume business. The wording of the section is unambiguous, and there can be no doubt that it is your duty to "make an inventory of the assets of the bank in duplicate." But is it necessary for you to file one of these in the office of the clerk of the Supreme Judicial Court for the county in which the principal office of the bank is located? And if it is necessary, on what date must such list be filed? It is my opinion that until you make a decision as to resumption or liquidation you are under no duty to file the list in court. To take over the property and business of the bank, and then to turn it back to the bank when it is ready to resume business, requires no application to any court. It is only in case of liquidation that the approval of the court must be sought, and there seems no sound reason for filing in court a list of claims as to which the court has no jurisdiction until liquidation proceedings are started.

It would seem that the words "hereinafter provided," at the end of the first sentence of section 4, qualify the clause "shall proceed to liquidate its affairs," and are not to be read as modifying the other provisions of that sentence.

The construction given to section 7 is strengthened by an examination of the law existing prior to the passage of St. 1910, c. 399, repealed by that act. Sections 9, 10 and 11 of chapter 590 of the Acts of 1908 in substance provided that when the continuance of a bank was hazardous, the Commissioner could apply to the Supreme Judicial Court for an injunction, and "upon making such application the commissioner may forthwith take possession of the property and business of the bank, and retain possession thereof pending the action of the court." The court could appoint receivers, who were to make schedules of property, a copy of which was to be delivered to the Commissioner, who had a right to examine the bank's officers and also the accounts of the receivers.

Under these provisions the court, and not the Bank Commissioner, determined whether or not there should be a liquidation, but pending court action the Commissioner had possession of the property and business of the bank, and continued to hold the same until receivers should be appointed. The appointment of receivers foreshadowed liquidation; but

unless a liquidation seemed likely, the Bank Commissioner handled the difficulty until the bank could resume business. This general idea is carried out more elaborately in St. 1910, c. 399, and it is my opinion that the proper construction of the act requires a negative answer to all of your questions.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Bonds — Purchase of Port Development Bonds — Treasurer and Receiver-General — Governor and Council.

Under St. 1920, c. 225, § 4, the Governor and Council must approve each purchase of bonds made under that section by the Treasurer and Receiver-General.

MAY 22, 1920.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — You inquire, in substance, whether the Governor and Council, under St. 1920, c. 225, § 4, must approve each specific purchase of bonds by the Treasurer and Receiver-General, or whether the Governor and Council may fix a rate at which bonds may be purchased, and authorize the Treasurer and Receiver-General to purchase at his discretion at that rate or one more favorable to the Commonwealth.

St. 1920, c. 225, § 4, provides as follows: —

For purchasing from time to time, at a price not exceeding the fair market value, with the approval of the governor and council, outstanding serial bonds of the loan for the development of the port of Boston authorized by section seventeen of chapter seven hundred and forty-eight of the acts of nineteen hundred and eleven, and acts in amendment thereof and in addition thereto, the treasurer and receiver-general is hereby authorized to expend, and there is hereby appropriated from, and upon the receipt from the United States of the proceeds from the sale of the Boston dry dock, a sum not exceeding two million seventy-eight thousand five hundred and sixty-one dollars and fifty-nine cents. All bonds so purchased shall be cancelled. Pending the purchase of said serial bonds, the treasurer and receiver-general, with the approval of the governor and council, is hereby authorized to invest and reinvest the said sum or any part thereof, from time to time, in other bonds or notes of the commonwealth.

In my opinion, the words, “with the approval of the governor and council” modify the word “purchasing.” To fix the rate in advance, and then to authorize the Treasurer and

Receiver-General to purchase such amounts of bonds as he from time to time may deem best, at the rate so fixed or at a rate more favorable to the Commonwealth, is not equivalent to approving each purchase. It leaves the Treasurer and Receiver-General to fix the amount of bonds to be purchased and also the time of purchase, both of which are essential ingredients of each contract of purchase. If it had been the intent of the General Court that the approval of the Governor and Council should be required only as to the price to be paid for the bonds, this could have been made to appear from the language of the statute. It should have provided "for purchasing from time to time, at a price not exceeding the fair market value, which shall be approved by the governor and council." By the express terms of the statute it must be assumed that the General Court intended the Governor and Council to have a voice in deciding not only the price at which the bonds should be purchased, but in what amounts and at what times such purchases should be made. If the Governor and Council were of the opinion that the bonds could be purchased to better advantage at a subsequent time, they might withhold their approval. Doubtless, the Treasurer and Receiver-General may make a tentative contract of purchase contingent upon subsequent approval by the Governor and Council, but such contract will not bind the Commonwealth unless and until such approval be given.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Corporations — Increase of Capital Stock — No Par Value
Stock — How to be valued for Filing Fee Purposes.*

St. 1920, c. 349, § 9 requiring a filing fee of one-twentieth of 1 per cent of the amount of stock with par value, and 5 cents a share for all shares without par value, by which the capital is increased, is an excise tax, and as such reasonable.

The Secretary of the Commonwealth, in respect to assessing the above excise, shall not be required to examine into the actual value of the shares where an increase of no par value stock is to be authorized, but shall consider shares of no par value as having a par value of \$100.

MAY 24, 1920.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth*.

DEAR SIR: — St. 1920, c. 349, entitled "An Act relative to the issue of capital stock by business corporations," permits

the issue of stock without par value, with certain restrictions as regards issue, voting, stockholders' liability and fees. Certain corporations desire to file with you articles of amendment changing their capital stock from shares of par value to shares without par value, under the provisions of St. 1920, c. 349, §§ 6 and 7.

You have asked my opinion whether you should accept such articles of amendment on payment of the fee fixed by St. 1903, c. 437, § 89, or whether you should receive a larger fee, under the provisions of St. 1920, c. 349, § 9.

St. 1920, c. 349, § 9, which amends St. 1903, c. 437, § 89, is as follows:—

The fee for filing and recording the certificate required by section forty-two providing for an increase of capital stock shall be one twentieth of one per cent of the amount of stock with par value and five cents a share for all shares without par value, by which the capital is increased.

St. 1920, c. 349, § 8, contains similar provisions in regard to the original issue of capital stock; and section 7, in amending St. 1903, c. 437, § 47, reads, in part, as follows:—

Such report of a corporation which has a capital stock of one hundred thousand dollars or more, for this purpose counting shares without par value as though of a par value of one hundred dollars each, shall be accompanied by a written statement. . . .

Gen. St. 1918, c. 235, in providing for an excise on foreign corporations, amends St. 1909, c. 490, pt. III, § 56, by adding thereto—

Provided, that for the purpose of assessing the excise upon corporations whose stock was issued without a par value one hundred dollars shall be considered par.

St. 1920, c. 349, § 1, provides that where shares with par value are to be issued the total amount of capital stock shall be not less than one thousand dollars, and where shares without par value are to be issued the number of shares without par value shall be not less than ten. Section 3, amending St. 1903, c. 437, § 27, provides, in part:—

The provisions of law relating to the issue of shares of capital stock with par value shall apply to the issue of shares without par value. . . .

Prior to the passage of the 1920 act the fees for filing and recording articles of organization and for the certificate providing for an increase of capital stock were based entirely upon the par value, without any reference to the value of the stock.

From the provisions cited it is clear that the Legislature intended, so far as fees were concerned, that the Secretary of the Commonwealth should consider shares of no par value as if they had a par value of \$100, and that he should not be required to examine into the actual value of the shares.

The provisions of sections 4 and 5 of the 1920 act, which limit the shareholders' liability to the value of the shares of no par value at the time of issuance, do not, in my opinion, require that for the purpose of levying an excise a similar rule should be followed. An excise need not be proportional but must be reasonable, and to require that a fee of 5 cents for each share without par value issued shall be paid to the Commonwealth is not, in my opinion, unreasonable legislation.

On the facts submitted to me it is my opinion that before accepting for filing articles of amendment you should receive a fee in accordance with the provisions of St. 1903, c. 437, § 89, as amended by St. 1920, c. 349, § 9, and not merely the fee required by St. 1903, c. 437, § 90.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Labor — Hours of Service — Employee of Railroad engaged in Interstate Commerce.

Where a woman receives and transmits orders which affect train movements in both interstate and intrastate commerce, her hours of service are governed by the Federal Hours-of-Service Act (act of March 4, 1907; 34 Stat. 1415) and not by Gen. St. 1919, c. 113.

MAY 27, 1920.

E. LEROY SWEETSER, Esq., *Commissioner of Labor and Industries*.

DEAR SIR:— You inquire whether Gen. St. 1919, c. 113, or the Federal Hours-of-Service Act (act of March 4, 1907; 34 Stat. 1415), governs the hours of labor of a woman employed by a railroad engaged in interstate commerce, "who by the use of the telegraph or telephone dispatches, reports,

transmits, receives or delivers orders to or affecting train movements.”

The answer to your question is, in my opinion, determined by *Erie R.R. Co. v. New York*, 233 U. S. 671, to which you call my attention. That case, like *Northern Pacific Railway v. Washington*, 222 U. S. 370, decided that the Federal Hours-of-Service Act superseded State legislation relative to the hours of service of persons employed by railroads in interstate commerce. I understand that, in the case which you put, the woman in question is engaged in interstate commerce to a greater or less extent. It is clearly impossible to govern her hours of labor in intrastate commerce by State law and her hours of labor in interstate commerce by Federal law. The two are so inextricably intermingled that separation cannot be made. In such a case the State law yields to the paramount power of Congress over interstate commerce. *New York Central R.R. Co. v. Winfield*, 244 U. S. 147; *Houston & Texas Ry. v. United States*, 234 U. S. 342; *Minnesota Rate Cases*, 230 U. S. 352.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Cities and Towns — Americanization Classes — Reimbursement by Commonwealth.

Cities and towns maintaining schools or classes to promote Americanization, under Gen. St. 1919, c. 295, are not entitled to further reimbursement under the provisions of Gen. St. 1919, c. 363, on account of expenditures for teachers employed in such schools or classes.

MAY 28, 1920.

Dr. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR: — You request my opinion as to whether cities and towns maintaining schools or classes to promote Americanization, under Gen. St. 1919, c. 295, are entitled to further reimbursement under the provisions of Gen. St. 1919, c. 363, on account of expenditures for teachers employed in such schools or classes.

Gen. St. 1919, c. 295, provides for the establishment of schools or classes for the education of persons over twenty-one years of age who are unable to speak, read or write the English language. Section 2 of said chapter 295 provides as follows: —

Any city or town desiring to obtain the benefits of this act may apply therefor to the board, shall conduct the educational work herein provided for in conjunction with the board and shall be entitled to receive from the commonwealth, at the expiration of each school year and on the approval of the board one half of the sums expended by it in carrying out the provisions hereof. Teachers and supervisors who are employed by cities and towns for the above purpose shall be chosen and their compensation shall be fixed by the local school committee, subject to the approval of the board.

Gen. St. 1919, c. 363, provides for the reimbursement, in part, of cities and towns "for expenditures for salaries of teachers, supervisors, principals, assistant superintendents, and superintendents of schools, for services rendered in the public day schools."

Inasmuch as the provisions of said chapter 363 are to apply solely to services rendered by teachers in the "public day schools," the question raised by your inquiry is whether or not Americanization schools or classes can be said to be included within the meaning of that phrase.

The phrase "public schools," as used in the Constitution and the laws of this Commonwealth, has acquired a common and well-settled meaning. It refers and is limited to schools which form a part of the general system of education for the children of the Commonwealth, and which are the kind of schools that cities and towns are by statute required to maintain as a part of our system of common education (R. L., c. 42, § 1), and that children of legal school age are obliged to attend (R. L., c. 44, § 1).

Schools or classes established and maintained for the instruction of voluntary pupils in certain specified branches of education, which do not form a part of the general system of education which the law requires cities and towns to maintain, are not included within the meaning of said term. *Merrick v. Amherst*, 12 Allen, 500; *Jenkins v. Andover*, 103 Mass. 94; III Op. Atty.-Gen. 75.

As the schools or classes referred to in said Gen. St. 1919, c. 295, are to be established for persons over twenty-one years of age, for instruction therein of certain specified subjects, and as both the establishment of such schools by cities and towns and the attendance on the part of the persons for whose benefit they are established are purely optional, I am of the opinion that such schools or classes cannot be said

to be a part of the public school system of the cities and towns in which they are established and maintained. Not being a part of the public school system, they necessarily cannot be included within the meaning of the phrase "public day schools," which constitute a component part of the public school system.

I am therefore of the opinion that the provisions of said Gen. St. 1919, c. 363, do not apply to said chapter 295 of the acts of that year, and that cities and towns conducting schools or classes under the provisions of said chapter 295 are not entitled to additional reimbursement, under the provisions of said chapter 363, on account of salaries paid to teachers in the said schools.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Police Power — Interference with Interstate Commerce — Commissioner of Public Safety — Regulation of Sale, Lease, Loan or Use of Motion-picture Films.

A bill prohibiting the selling, leasing, loaning or using for public exhibition or commercial purposes any motion-picture film, unless the film has been submitted to and approved by the Commissioner of Public Safety, would be unconstitutional if enacted into law, as it would violate that clause of section 8 of article I of the Constitution of the United States which gives Congress the power to regulate commerce among the several States.

JUNE 3, 1920.

His Excellency CALVIN COOLIDGE, *Governor of the Commonwealth*.

SIR: — Your Excellency has requested my opinion upon the constitutionality of House Bill No. 1540, entitled "An Act relative to the approval and public exhibition of motion-picture films." Section 2 of said bill provides: —

On and after January first, nineteen hundred and twenty-one, it shall be unlawful for any person to sell, lease, loan or use for public exhibition or commercial purposes any motion-picture film unless the said film has been submitted to and approved by the commissioner.

The language of this section is not limited to the inspection and approval of motion-picture films to be used for public

exhibition within the Commonwealth, and, in this respect, it goes farther than the motion-picture censorship laws which were upheld in *Mutual Film Co. v. Industrial Commission of Ohio*, 215 Fed. Rep. 138, affirmed, 236 U. S. 230, and *Mutual Film Corp. v. Kansas*, 236 U. S. 248. It is my opinion that this section is so broad that it would apply to a sale, lease or loan in this Commonwealth of a motion-picture film made in this state and on its way into another state, and would also apply to a film in the original package in which it might be shipped into this state from another state or from a foreign country. If so, it is to that extent in conflict with that clause of section 8 of article I of the Constitution of the United States which confers on Congress power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Brown v. Maryland*, 12 Wheat. 419; *Leisy v. Hardin*, 135 U. S. 100; *Schollenberger v. Pennsylvania*, 171 U. S. 1. I am therefore of opinion that said section 2 is an attempt directly to regulate interstate commerce, and is, accordingly, unconstitutional.

I would also call your attention to section 4, which provides for an appeal to the Superior Court sitting in equity. While I feel that there is a strong probability that the constitutional requirement that one shall have a right to trial by jury where the value in controversy exceeds \$20 is complied with, in that the remedy in equity is not necessarily exclusive, nevertheless, in my judgment it would have been advisable to add to the section some provision stating that it should not be construed to deprive any person of the right to pursue any other lawful remedy. If this section is constitutional, it would be so because of an interpretation of its meaning made by a court rather than by the clear wording of the section itself. In its present form the question of its constitutionality might be raised.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Boston School Teachers — Part-time Employment — Retirement Systems.

Regular academic teachers of the city of Boston, who are members of the retirement system for Boston public school teachers and who are employed on a part-time basis in vocational schools, are not obliged, under the provisions of St. 1914, c. 494, to enroll as members of the State retirement system.

Teachers who enter the service of the city of Boston, employed on a part-time basis in vocational schools operating under the provisions of St. 1911, c. 471, and who are also employed in the academic courses in the public schools of the city of Boston, are not obliged to enroll as members of the State retirement system, as said teachers must, under the provisions of St. 1908, c. 589, become members of the retirement system for the Boston public school teachers.

JUNE 4, 1920.

MR. CLAYTON L. LENT, *Secretary, Teachers' Retirement Board, Department of Education.*

DEAR SIR: — You state that the city of Boston has recently established certain schools operating under St. 1911, c. 471, in which schools some of the regular academic teachers of the city of Boston, who are members of the retirement system for Boston public school teachers, are employed on a part-time basis.

You request my opinion as to whether it will be necessary, by virtue of the provisions of St. 1914, c. 494, to enroll these teachers as members of the State teachers' retirement system, provided they never served in public schools of Massachusetts prior to July 1, 1914, and, if it is so necessary, whether they will be required to pay assessments on their total salary or only on the salary received for vocational work.

You further desire my opinion as to whether it will be necessary for a teacher who enters the service of the city of Boston in the future, employed on a part-time basis in vocational schools and also in the academic courses, to become a member of the State system, and whether, if so required, the assessments will be based on the total salary or only on the salary received for the vocational work.

The Massachusetts retirement system was established by the Legislature under the provisions of St. 1913, c. 832. Teachers employed in the public schools of the city of Boston were exempt from becoming members of this system by

paragraph (3), of section 3 of said chapter 832, which provides as follows: —

Teachers in the service of the public schools of the city of Boston shall not be included as members of the retirement association.

The reason for this exemption was due, no doubt, to the fact that the city of Boston already had a local teachers' pension system of its own, established under the provisions of St. 1908, c. 589.

This remained a law of the Commonwealth until the Legislature enacted St. 1914, c. 494, which provides as follows: —

SECTION 1. Teachers employed by the city of Boston prior to the thirtieth day of June, nineteen hundred and fourteen, in schools operating under the provisions of chapter four hundred and seventy-one of the acts of the year nineteen hundred and eleven and of chapter eight hundred and five of the acts of the year nineteen hundred and thirteen, may become members of the teachers' retirement association, as established by chapter eight hundred and thirty-two of the acts of the year nineteen hundred and thirteen, in the manner prescribed by paragraph (2) of section three of said chapter; and all teachers employed in the said schools for the first time after the first day of July, nineteen hundred and fourteen, shall thereby become members of the said retirement association as prescribed by paragraph (1) of said section three.

SECTION 2. Paragraph (3) of section three of said chapter eight hundred and thirty-two shall not be construed as applying to the teachers described in section one of this act.

It is quite clear that in enacting said statute the Legislature intended to differentiate between the regular public schools of the city of Boston and the schools to be conducted by that city under the provisions of St. 1911, c. 471. As regards the former, Boston teachers were to continue to become members of the Boston system, while as regards the latter, they were to enroll as members of the State system; the reason for the change being apparently due to the fact that the latter schools were receiving State aid, and that these teachers were not eligible to membership in the Boston system.

St. 1913, c. 832, § 12, provides as follows: —

(1) No person required to become a member of the association under the provisions of paragraph (1) of section three of this act shall

be entitled to participate in the benefits of any other teachers' retirement system, supported in whole or in part by funds raised by taxation, or to a pension under the provisions of chapter four hundred and ninety-eight of the acts of the year nineteen hundred and eight, or chapter five hundred and eighty-nine of the acts of the year nineteen hundred and eight, as amended by chapter six hundred and seventeen of the acts of the year nineteen hundred and ten.

(2) No member of the retirement association shall be eligible to receive any pension as described in section six of this act, who is at the time in receipt of a pension paid from funds raised in whole or in part from taxation under the provisions of chapter four hundred and ninety-eight of the acts of the year nineteen hundred and eight, or chapter five hundred and eighty-nine of the acts of the year nineteen hundred and eight, as amended by chapter six hundred and seventeen of the acts of the year nineteen hundred and ten, or of any other act providing pensions for teachers, providing that this paragraph shall not be construed as applying to the Boston Teachers' Retirement Fund Association.

Under the provisions of this section a teacher who is a member of the Boston system on becoming a member of the State system would forfeit her right to participate in the benefits of the Boston system.

To hold, therefore, that under the provisions of St. 1914, c. 494, a teacher employed by the city of Boston in the academic department of the public schools, who is a member of the retirement system for Boston public school teachers, must, on being employed in the vocational schools or courses, established under the provisions of said chapter 494, also enroll as a member of the State teachers' retirement system, would work an injustice to said teachers, as they would be obliged to continue to pay their assessments as members of the Boston system and yet would not be entitled to receive the benefits therefrom.

Since the retirement systems were established to benefit the public school teachers and not to penalize or to impose burdens upon them, I am of the opinion that the Legislature had no intention to include within the provisions of said chapter 494 teachers who, upon entering their employment as part-time teachers in the vocational schools, were in addition thereto employed by the city of Boston as teachers in the regular public schools thereof, and entitled to participate in the benefits of the Boston teachers' retirement system. I am therefore of the opinion that it will not be necessary, by

virtue of the provisions of St. 1914, c. 494, to enroll regular academic teachers of the city of Boston, who are members of the retirement system for Boston public school teachers, as members of the State teachers' retirement system upon their being employed on a part-time basis as teachers in schools conducted by the city of Boston and operating under the provisions of St. 1911, c. 471.

Since teachers employed by the city of Boston for the first time after July 1, 1914, in the academic courses of the regular public schools, being regularly employed on a full or on a part-time basis, must, under the provisions of St. 1908, c. 589, become members of the teachers' retirement association established under the provisions of said chapter, and inasmuch as such teachers would lose the benefits that they would be entitled to as members of said association upon being enrolled as members of the State system, I am of the opinion that the word "teachers," as used in said St. 1914, c. 494, was intended to apply only to teachers who at the time of entering the vocational schools, either on a whole or on a part-time basis, were not to be employed, in addition thereto, in the regular academic courses of the Boston public schools. I am therefore of the opinion that it will not be necessary for a teacher who enters the service of the city of Boston in the future, employed on a part-time basis in a vocational school operating under the provisions of St. 1911, c. 471, and who is also employed in the academic courses, to become a member of the State system.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Schools — Continuation Schools — Reimbursement of City or Town for Expenditures.

Continuation schools are not public day schools.

Cities and towns which maintain continuation schools are not entitled, on account of such schools, to the reimbursement provided in Gen. St. 1919, c. 363, § 2, on account of expenditures for public day schools.

JUNE 13, 1920.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR: — You ask my opinion as to whether cities and towns maintaining continuation schools under the provisions

of Gen. St. 1919, c. 311, are entitled to further reimbursement under the provisions of Gen. St. 1919, c. 363, on account of expenditures for teachers employed in such schools.

Gen. St. 1919, c. 311, provides for the establishment and maintenance of continuation schools by cities and towns for employed minors under sixteen years of age.

Paragraph (4) of section 1 of said chapter 311, provides that,—

. . . when established, the said continuation schools or courses shall be considered a part of the public school system of the municipality wherein the minors attending the same are employed.

Section 2 of said chapter 311 provides as follows: —

Cities and towns maintaining such continuation schools or courses of instruction as are approved by the board of education as to organization, control, situation, equipment, courses of study, qualifications of teachers, methods of instruction, conditions of admission, employment of pupils and expenditures of money, shall receive reimbursement from the treasury of the commonwealth to an amount equal to one half the total sum raised by local taxation and expended for the maintenance of such schools or courses of instruction.

Gen. St. 1919, c. 363, §§ 1 and 2, provide as follows: —

SECTION 1. The treasurer and receiver general shall, on or before the fifteenth day of November, nineteen hundred and nineteen, and annually thereafter, set aside from the proceeds of the income tax a sum of money sufficient to provide for the purposes of Part I of this act, and which shall be available therefor without further appropriation by the general court.

SECTION 2. The treasurer and receiver general shall, as herein provided, distribute said sum on or before the fifteenth day of November, nineteen hundred and nineteen and annually thereafter, to the several cities and towns of the commonwealth as reimbursement, in part, for expenditures for salaries of teachers, supervisors, principals, assistant superintendents, and superintendents of schools, for services rendered in the public day schools during the year ending on the thirtieth day of June next preceding.

Under the provisions of said chapter 363 the reimbursement to which cities and towns are entitled is limited to expenditures for salaries of teachers, supervisors, principals, assistant superintendents and superintendents of schools for

services rendered in the *public day schools*, and is based upon a fixed scale determined by the salaries paid.

Previous to the enactment of Gen. St. 1919, c. 311, continuation schools were held not to be a part of the public school system, and as public day schools were a part of the public school system, it is quite evident that continuation schools could not have been included within the meaning of the phrase "public day schools." As said chapter 311 explicitly provides that continuation schools, when established shall be considered a part of the public school system, the question therefore arises as to whether, under this provision, continuation schools may also be said to be included within the meaning of the phrase "public day schools."

Though both the "public day schools" and the "continuation schools" now form a part of the public school system, it is quite evident that they are not synonymous. The term "public day school" long prior to the passage of said chapter 311 had acquired a common and well-understood meaning, and included such day schools as cities and towns were obliged to establish and maintain for children of school age, and such as children, on the other hand, were obliged to attend.

Up to the year 1913 all children between the ages of seven and fourteen years, with certain exceptions not here material, were obliged to attend these schools (R. L., c. 44, § 1). That year the Legislature enacted chapter 779, section 1 of which provides, with certain exceptions not here material, that "every child under sixteen years of age who has not received an employment certificate as provided in this act . . . shall attend a public day school." As to children between the ages of fourteen and sixteen years who became regularly employed and did receive employment certificates, the Legislature, the same year, under the provisions of chapter 805, established continuation schools or classes.

While the public day school was under the sole jurisdiction of the school committee of the city or town in which it was established, the continuation schools, under the provisions of St. 1913, c. 805, and of Gen. St. 1919, c. 311, were "to be approved by the board of education as to organization, control, situation, equipment, courses of study, qualifications of teachers, methods of instruction, conditions of admission, employment of pupils and expenditures of money."

That the Legislature intended to differentiate between

these schools is further apparent from Gen. St. 1919, c. 311, § 1, par. (2), which provides "that upon application of the parent or guardian of the minor involved, instruction in the regular schools shall be accepted as instruction equivalent to that provided for by this act." By the term "regular schools" the Legislature referred to the public day schools as distinguished from the continuation schools.

Gen. St. 1919, c. 311, § 1, provides for State reimbursement of cities and towns which maintain continuation schools, to an amount equal to one-half the total sum raised by local taxation and expended for the maintenance of such schools or courses of instruction. This act applies to continuation schools only. It does not apply to public day schools. Gen. St. 1919, c. 363, provides a different scheme of reimbursement in respect to "public day schools." If this term should be held to include continuation schools, it would make both schemes of reimbursement applicable to such schools, although but one scheme of reimbursement would apply to regular public day schools. The regular public day schools are, however, the principal public school system, to which the continuation schools are merely a supplement. A construction of Gen. St. 1919, c. 363, which would apply both schemes of reimbursement to the supplementary system, and only a single scheme of reimbursement to the principal system, is so unreasonable that it should not be adopted unless the language of the act plainly requires it. I find nothing in Gen. St. 1919, c. 363, which constrains me to reach so unsatisfactory a conclusion. On the contrary, the Legislature, in enacting Gen. St. 1919, c. 363, seems to have employed the phrase "public day schools" in order to distinguish those schools from the continuation schools, because the latter schools are, under Gen. St. 1919, c. 311, to be considered, for certain purposes, a part of the public school system. I am therefore of opinion that cities and towns which maintain continuation schools are not entitled, on account of such schools, to the reimbursement provided in Gen. St. 1919, c. 363, on account of expenditures for public day schools.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Cold Storage — Reports to Department of Public Health —
Liability to Criminal Prosecution.*

A person holding in cold storage any article of food for a period longer than twelve calendar months, without the consent of the Department of Public Health, violates St. 1912, c. 652, § 5, as amended by Gen. St. 1917, c. 149, § 3, and is liable for such violation, whether or not a report is thereafter made to the Department.

JUNE 16, 1920.

EUGENE R. KELLEY, M.D., *Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion as to whether a warehouseman, reporting to your Department that food has been kept in cold storage for twelve calendar months, is because of such report, relieved from liability to criminal prosecution under the provisions of St. 1912, c. 652, as amended by Gen. St. 1917, c. 149, and by Gen. St. 1919, c. 28.

St. 1912, c. 652, § 5, as amended by Gen. St. 1917, c. 149, § 3, is as follows: —

No person, firm or corporation shall hold any article of food in cold storage within this commonwealth which has been in cold storage for a period longer than twelve calendar months, except with the consent of the state department of health. The said department may, upon application, grant permission to extend the period of storage beyond twelve months for a particular consignment of goods, if the goods in question are found, upon examination, to be in proper condition for further storage at the end of twelve months. The length of time for which further storage is allowed shall be specified in the order granting the permission. A report on each case in which such extension of storage is permitted, including information relating to the reason for the action of the department, the kind and the amount of goods for which the storage period was extended, and the length of time for which the continuance was granted, shall be included in the annual report of the department.

St. 1912, c. 652, § 9, is as follows: —

The state board of health may make rules and regulations to secure a proper enforcement of the provisions of this act, including rules and regulations with respect to the use of marks, tags or labels and the display of signs, and may fix penalties for the breach thereof.

Under the authority of this section you have made rules and regulations, under date of May 5, 1917. Rule 3 is as follows: —

When articles of food have been kept in cold storage for twelve calendar months, report of such fact shall be made to the State Department of Health by the persons having custody of such articles, and such articles shall not be removed from cold storage by the owners until they have been inspected by the agents of the State Department of Health, and released by order of the Department.

The authority of the Department of Public Health, which has succeeded to the powers of the State Board of Health, under section 9, above cited, is limited to making "rules and regulations to secure the proper enforcement of the provisions" of said chapter 652, and fixing penalties for the breach thereof. It necessarily follows that it is beyond the scope of the authority of the Department, by any rule or regulation, to nullify the prohibition contained in section 5 of said chapter 652, as amended by Gen. St. 1917, c. 149, § 3.

If a person, firm or corporation has held in cold storage any article of food for a period longer than twelve calendar months without the consent of the Department of Public Health, such person, firm or corporation has violated the provisions of the act above cited, and is liable for such violation, whether or not a report is thereafter made to the Department of Public Health by the persons having custody of such articles.

The language of the statute, "no person, firm or corporation," is not controlled by any words of limitation, and is broad enough to include the owners of the goods in cold storage and the warehouseman in whose custody they are held.

The purpose of rule 3 is to require the warehouseman to give notice to the Department of Public Health of articles held in cold storage more than a year, in order that the articles may be inspected, and to require their detention until such time as they have been inspected by the agents of the Department and duly released. The rule applies equally to goods which have been held in cold storage beyond the period of twelve calendar months by permission of the Department, as well as to goods which have been held longer than the prescribed period without the knowledge and permission of the Department.

Without passing upon the validity of rule 3 of the rules and regulations established under date of May 5, 1917, as

applied to a case where the required report discloses a violation of law, I am of opinion that compliance by the warehouseman with said rule 3 in no respect relieves the warehouseman of liability for any offense disclosed by said report.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Schools — Superintendency Unions — Superintendent — Minimum Salary.

Previous service in one superintendency union established under R. L., c. 42, § 43, and amendments thereof, is not to be counted in determining the minimum salary which another union must pay to the same superintendent under R. L., c. 42, § 45, as amended by St. 1920, c. 371.

JUNE 22, 1920.

DR. PAYSON SMITH, *Commissioner of Education*.

DEAR SIR:— You ask my opinion upon the following case:—

R. L., c. 42, § 43, provides that, under certain circumstances, two or more towns shall form a union for the purpose of employing a superintendent of schools. Section 45 of the same chapter provided that when certain conditions had been satisfied the Commonwealth should contribute on account of such union the sum of \$1,250, of which three-fifths, or \$750, should be paid for the salary of said superintendent, and the remainder distributed in certain proportions among the towns which formed such union. By Gen. St. 1918, c. 109, the Legislature amended said section 45 by substituting therefor a new section, which provided, in substance, that when it was duly certified that the towns had unitedly employed a superintendent of schools and had expended for his salary for the school year ending June 30 "a sum not less than eighteen hundred dollars," the sum of \$1,250 should be apportioned among the towns forming such union, in proportion to the amounts paid by them for the salary of such superintendent, and should be expended for the support of the public schools. By St. 1920, c. 371, the Legislature further amended said section 45 by substituting therefor a new section, which contains the following provision:—

(a) The salary of the superintendent in such a union shall be not less than the amounts provided in the following schedule: Twenty-two hundred dollars for the first year of service, twenty-three hundred dollars for the second year, twenty-four hundred dollars for the third year, twenty-five hundred dollars for the fourth year. In case his salary is not in excess of twenty-nine hundred dollars, he shall also be reimbursed for his actual travelling expenses incurred in the discharge of his duties, but such reimbursement may be limited by the school committee to four hundred dollars a year.

You inquire whether a union which employs for the first time a superintendent of schools who has already served four years in another union in this state must pay such superintendent a minimum salary of \$2,200 or of \$2,500.

The act, as amended, does not prescribe the salary of the superintendent of a union. It prescribes a minimum below which that salary must not fall. The union may pay as much more as it sees fit or as the parties may agree upon. The single question, therefore, is whether previous service in one union is to be considered in determining the minimum salary to be paid by another union.

A town is a political subdivision of the State. This act is in effect a legislative grant which places a burden upon towns, a part of which is borne by the State. In case of doubt, such an act is to be construed in favor of the State and of the town. *Butchers Slaughtering, etc., Assn. v. Boston*, 214 Mass. 254, 258. There is no express provision that previous service in another union is to be considered in determining the minimum salary which a union must pay. If such was the intention of the Legislature, it would have been easy to have so provided in unmistakable terms. To reach this result by construction not only resolves a possible doubt against the State and the towns, but also seems to require the addition of words by implication. The payment is made for service "in such a union." The increase is for further years of service therein. Full effect is given to the language used if service in the particular union is alone considered. I am not unmindful that by R. L., c. 8, § 4, par. 4, "words importing the singular number may extend and be applied to several persons or things," unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the same statute. But I do not find that this provision is applicable. I am therefore of opinion that previous service in another

union is not to be considered in fixing the minimum salary of a superintendent, and that in the case which you put the minimum salary is \$2,200 rather than \$2,500.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Fisheries and Game — Act of Fishing — Rowing Boat for Another to troll.

A man who is rowing a boat for his wife, while she is fishing by means of trolling, cannot be prosecuted for fishing without a license.

If he also engaged in landing the fish, or otherwise assisted in the fishing operation, he might well be held to be engaged in fishing.

JULY 1, 1920.

MR. WILLIAM C. ADAMS, *Director, Division of Fisheries and Game, Department of Conservation.*

DEAR SIR: — You have requested my opinion as to whether or not, under the provisions of Gen. St. 1919, c. 296, relative to hunting and fishing licenses, a man who is rowing a boat for his wife, while she is fishing by means of trolling, needs a fishing license. You point out that under section 8 a woman is not required to take out a license to fish, and therefore you wish to know whether or not, if her husband rows a boat for his wife while she is fishing, he could be prosecuted for fishing without a license.

Gen. St. 1919, c. 296, provides that it shall be unlawful for any person to hunt or to fish in any of the inland waters of the Commonwealth without having first obtained a certificate of registration.

So far as your question is concerned, all that the statute makes unlawful is fishing without a license, and applies only to the act of fishing. In my judgment, the statute cannot be construed to include a man who rows a boat for his wife, who is trolling for fish, any more than it would apply to an owner of a motor boat who for hire operated the boat on inland waters in order to enable a woman to fish therein.

Just what constitutes "fishing," within the prohibition of the act, is a question of fact to be determined in view of all the circumstances in each individual case. If the person

rowing the boat also engaged in landing the fish, or otherwise assisted in the fishing operation, he might well be held to be engaged in fishing.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Fisheries and Game — Short Lobsters — Search without a Warrant — Hotel Kitchen, Ice Box, Connecting Parts of Building.

Under St. 1904, c. 367, as amended by St. 1910, c. 548, officers of the Division of Fisheries and Game can, if there is reason to believe that short lobsters are being held, search without a warrant a hotel kitchen, ice box and such parts of connecting buildings as are not occupied for dwelling purposes.

JULY 2, 1920.

MR. WILLIAM C. ADAMS, *Director, Division of Fisheries and Game, Department of Conservation.*

DEAR SIR: — You have requested my opinion as to whether or not, under the provisions of St. 1904, c. 367, as amended by St. 1910, c. 548, your officers would be justified in searching without a warrant for short lobsters in a hotel kitchen, ice box or such parts of connecting buildings as are not used for sleeping quarters.

The original statutory provision in point is found in R. L., c. 91, § 91. It deals with the right of search for short lobsters, and reads as follows: —

For the purpose of enforcing the provisions of section eighty-eight (legal length of lobsters), any one of the commissioners on fisheries and game or their deputy or any member of the district police may search in suspected places for, seize and remove lobsters which have been unlawfully taken, held or offered for sale.

Subsequently the Legislature passed a general law relative to the right of search relating to any game or fish. This statute is St. 1904, c. 367, as amended by St. 1910, c. 548, and reads as follows: —

SECTION 1. Any commissioner on fisheries and game, deputy commissioner on fisheries and game, or member of the district police, may, with or without a warrant, search any boat, car, box, locker, crate or package, and any building, where he has reason to believe any game

or fish taken or held in violation of law is to be found, and may seize any game or fish so taken or held, and any game or fish so taken or held shall be disposed of by the commissioners on fisheries and game as they may deem advisable for the best interests of the commonwealth: *provided, however*, that this section shall not authorize entering a dwelling house, or apply to game or fish which is passing through this commonwealth under authority of the laws of the United States.

SECTION 2. A court or justice authorized to issue warrants in criminal cases shall, upon complaint under oath that the complainant believes that any game or fish unlawfully taken or held is concealed in a particular place, other than a dwelling house, if satisfied that there is reasonable cause for such belief, issue a warrant to search therefor. The search warrant shall designate and describe the place to be searched and the articles for which search is to be made, and shall be directed to any officer named in section one of this act, commanding him to search the place where the game or fish for which he is required to search is believed to be concealed, and to seize such game or fish.

It is not necessary to make any extended argument to establish the fact that lobsters are included within the designation "fish" in section 1 of the general act. The general law relating to fisheries, comprising R. L., c. 91, contains the provisions relative to lobsters, and section 91 of that chapter is undoubtedly superseded by St. 1904, c. 367.

The remaining question is whether the provision in the statute which exempts dwelling houses from the right of search without a warrant makes it unlawful to search without a warrant a hotel kitchen, ice box or such parts of connecting buildings as are not used for sleeping quarters. The distinction, as correctly indicated by your question, is not between a hotel and a dwelling house, but between such parts of a hotel as are not used for dwelling purposes; and the line of demarcation, generally speaking, is between those parts of a hotel which are occupied by the guests, and which have the privacy of a dwelling house, and those parts of a hotel which are public, where the privacy of a person living in a hotel would not be invaded. There can be no question that a restaurant could be searched, and it should make no difference whether the restaurant is conducted as a part of a hotel or without provision for lodging guests. In the same way a room which might be exempt from the right of search when used by a guest would not be exempt from search if it was not in use by a guest but was being used as a storeroom by the proprietor.

I am, accordingly, of the opinion that your officers would be justified in searching a hotel kitchen, ice box or such parts of connecting buildings as are not occupied for dwelling purposes.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Pardoning Power — Discharge of a Person committed to the State Hospital at Bridgewater after Trial for Murder.

The pardoning power does not extend to one confined at the State Hospital at Bridgewater when such person has been committed after having been found not guilty of murder on account of insanity.

Such person may be discharged, however, by the Governor, with the advice and consent of the Council, when, after an investigation by the Department of Mental Diseases, the Governor is satisfied that the person so confined may be discharged without danger to others.

JULY 2, 1920.

HIS EXCELLENCY CALVIN COOLIDGE, *Governor of the Commonwealth*.

SIR: — My opinion is requested by Your Excellency upon the question whether the Governor and Council have authority to consider an application for release from the Bridgewater State Hospital. The applicant was found not guilty of murder on account of insanity, and was committed for life to the Bridgewater State Hospital, on Oct. 9, 1916. He now applies for pardon on the ground that his sanity is restored.

First of all, I am of opinion that this is not a case for the exercise of the pardoning power. Mass. Const., pt. 2d, c. II, § 1, art. VIII, places "the power of pardoning offences" in the Governor, by and with the advice of the Council. The applicant in this case was found "not guilty" by the jury before whom he was tried; he has therefore committed no offence for which he may be pardoned.

Relative to the question of discharge from confinement, as distinguished from pardon, St. 1909, c. 504, § 104, provides: —

If a person who is indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital for the insane during his natural life, and he may be discharged therefrom by the governor, with the

advice and consent of the council, when he is satisfied after an investigation by the state board of insanity that such person may be discharged without danger to others.

The meaning of this statute is made very clear in the case of *Gleason v. Inhabitants of West Boylston*, 136 Mass. 489, 490, where the following language appears: —

The practical effect of the St. of 1873 is to provide that, in case of an indictment for homicide, the insanity of the defendant is not a defence which entitles him to an unconditional acquittal, but that he shall be detained in confinement until it appears to the Governor and Council that he may be discharged and set at large without danger to others. He is not committed to the hospital for the purposes of treatment as a lunatic. He is not held there as other inmates are held; he cannot be discharged, as others can be, by the trustees, or by a court upon proof that he is not insane, or, if insane, can be sufficiently provided for by himself or his friends, or the town of his settlement. Pub. Sts. c. 87, § 40. He is confined in the hospital as a place of detention, because his being at large would be dangerous to the peace and safety of the community.

Gen. St. 1916, c. 285, § 1, provides: —

The state board of insanity . . . is hereby abolished. All the rights, powers and duties of said board are hereby transferred to . . . the commission on mental diseases. . .

Gen. St. 1919, c. 350, § 79, provides that “the department of mental diseases shall consist of the Massachusetts commission on mental diseases. . . .”

It appears, therefore, that the investigation provided for by St. 1909, c. 504, § 104, above quoted, is to be made by the Department of Mental Diseases.

It is my opinion that Your Excellency, with the advice and consent of the Council, has authority to consider the application for discharge from the institution, but that no discharge can be granted unless, after an investigation by the Department of Mental Diseases, Your Excellency is satisfied that the applicant may be discharged without danger to others.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

*Interstate Rendition — Information — Sworn Evidence of Flight
from Justice.*

An information is neither an indictment nor "an affidavit made before a magistrate charging the person demanded" with crime, one of which is required by § 5278 of the Revised Statutes of the United States as a condition of compliance with a requisition for the surrender of a fugitive from justice.

Transcripts of testimony are not "sworn evidence" that the person demanded is a fugitive from justice, as required by R. L., c. 217, § 11.

JULY 6, 1920.

HIS EXCELLENCY CALVIN COOLIDGE, *Governor of the Commonwealth.*

SIR: — You have referred to this department for examination and report a requisition of the Governor of Vermont, with accompanying papers, for the arrest and extradition of certain alleged fugitives from justice charged with the crime of adultery.

Pursuant to a request of counsel for the alleged fugitives, a hearing was held at this office on the first day of July, 1920. No testimony or argument was submitted at the hearing tending to show that the requisition of the Governor of Vermont should not be complied with. One of the alleged fugitives stated that she was "probably" in Vermont on the day when the crime is alleged to have been committed, namely, the first day of April, 1919; and the other alleged fugitive stated that he was not in Vermont on that day, but admitted that he was there later in the month of April, 1919, and at various other times before and after the first day of April, 1919. This testimony on the part of the demanded persons themselves tended to support rather than contradict the proof accompanying the demand that the persons demanded are fugitives from justice of the State of Vermont.

I am of opinion, however, after a careful examination of all the papers, that Your Excellency would not be justified in complying with the demand of the Governor of Vermont so long as it is based upon the complaint which now accompanies it.

Except for certain provisions of our local statutes, which are procedural in their nature and supplemental to Federal law, the statutory law of interstate rendition is to be found in section 2 of article IV of the Constitution of the United

States and in the Revised Statutes of the United States, § 5278, (Compiled Statutes, § 10126). The latter provides:—

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.

Your Excellency will observe that the statute requires the executive authority of the demanding State to produce “a copy of an indictment found or an *affidavit* made before a magistrate, charging the person demanded” with crime. The Governor of Vermont has produced a complaint. In my opinion, this complaint is not an affidavit, and therefore the demand of the Governor of Vermont is not brought within the terms of the Federal statute above quoted.

In Cyclopaedia of Law and Procedure, vol. 2, p. 4, an affidavit is defined to be “a declaration on oath, reduced to writing, and affirmed or sworn to by affiant before some person who has authority to administer oaths.” The complaint before me purports to be made by Ernest E. Moore, State’s Attorney, “on his oath of office,” and does not appear to have been sworn to before the magistrate whose signature authenticates it. Said magistrate does not state that it was sworn to before him, but states, on the contrary, that it “was *exhibited* to the court” on a date named. As appears from a certificate of the Governor of Vermont, which accompanies the requisition, the State’s Attorney has forwarded his oath of office to the Executive Department of the State; but it does not appear that this oath was taken before the magistrate whose

name appears upon the complaint, or that it was taken with reference particularly to the facts alleged therein. I am of opinion, therefore, that the complaint does not come within the above-quoted definition of an affidavit.

The document before me is an information rather than an affidavit. The State's Attorney, who executed it, does not profess to have any personal knowledge that would justify him in making an affidavit to the facts. This construction is supported by the following quotation from an affidavit made by the State's Attorney, which accompanies the requisition: —

That the court then directed that the matter be brought to the attention of the State's Attorney for prosecution. That no grand jury has been in session in Windsor County since said trial, and the matter has never been before the grand jury.

The trial referred to was held upon a petition for divorce, out of which the prosecution for adultery arose, and the State's Attorney was not a witness in that proceeding. Moreover, the State's Attorney stated in conversation at the hearing in this office that he had no personal knowledge of the alleged crime, and had made his complaint at the suggestion of the court before whom the said trial of divorce was heard.

Substantially the very question herein discussed was raised in *State v. Richardson*, 34 Minn. 115, and was decided by the Supreme Court of Minnesota in accordance with the view above expressed. At page 117 the court said: —

But a complaint is not necessarily an affidavit, nor are they in legal practice or contemplation understood as convertible terms. For, though a complaint may be reduced to writing and subscribed, it need not necessarily be certified by the magistrate, for the fact may otherwise appear by his records. And so a complaint may be merely formal, and made or entered by one who has but little, if any, knowledge about the facts, and the examination consist of the deposition of other witnesses [*State v. Armstrong*, 4 Minn. 251, (355)], while an affidavit, as the term is ordinarily used in such cases, is understood to be a sworn statement of facts or a deposition in writing, and to include a jurat, which means a certificate of the magistrate, showing that it was sworn to before him, including the date and sometimes, also, the place. *Young v. Young*, 18 Minn. 72, (90). In this class of cases it will be implied from the executive authentication that the certifying officer is such magistrate.

To the same effect is *Ex parte Hart*, 63 Fed. Rep. 249.

A second objection to compliance with the demand may possibly be raised. R. L., c. 217, § 11, provides that "such demand or application shall be accompanied by sworn evidence that the person charged is a fugitive from justice. . . ." The testimony of the demanded persons at the hearing in this office was not taken under oath. The only *sworn* evidence before Your Excellency, therefore, upon the flight from justice is a transcription of the evidence heard by the court in the divorce trial above referred to. By tending to prove the adultery charged in the complaint, this evidence tends to prove also that the demanded persons were in Vermont at or about the time when the crime is alleged to have been committed, and that they are therefore fugitives from justice. I am of opinion, however, that this transcription, though doubtless correct and accurate in all respects, is a record or report of sworn evidence rather than sworn evidence itself. Had the witnesses in the divorce proceeding appeared before Your Excellency and testified under oath to the same effect as upon the trial of divorce, or had they made affidavits to the same facts as to which they had testified at said trial, Your Excellency would have had before him the sworn evidence directed by the statute. As the matter stands, however, Your Excellency has before him merely what the court reporter certifies to have been the testimony of certain persons in a proceeding entirely distinct from this extradition proceeding. This, in my opinion, is hearsay evidence not sworn to, and is not the "sworn evidence" which the Legislature has said the Governor shall have before him. A certified copy of an affidavit, while perhaps as persuasive as the affidavit itself, would not be "sworn evidence," and the transcript of testimony annexed to the demand of the Governor of Vermont is open to the same objection.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Insurance — Discrimination — Trust Fund of Unearned Premium on Retroceded Business.

A plan by which an insurance company accepts reinsurance from direct writing companies, and then retrocedes all but a small part of such reinsurance to companies allied with it, under a contract by which such retrocessionaire is bound to hold the premium paid in advance upon the retroceded business in trust to pay over such premium to itself as and when earned, the unearned portion of such premium to be applied to procure reinsurance of the retroceded business in some other company, in case the retrocessionaire becomes insolvent or suffers an impairment of its capital, is in conflict with the policy declared by St. 1908, c. 151, and may involve a discrimination forbidden by St. 1912, c. 401, § 1, and therefore should not be approved by the Commissioner of Insurance.

JULY 6, 1920.

HON. CLARENCE W. HOBBS, *Commissioner of Insurance.*

DEAR SIR: — I have the honor to acknowledge your letter in which you request my opinion on the following questions of law: —

Under chapter 151 of the Acts of 1908 loss claims in the case of insolvency of a domestic fire insurance company are deemed to be preferred claims over claims for return premiums on uncompleted contracts. It is a not uncommon feature of contracts for reinsurance that the company which cedes reinsurance retains the unearned premiums as a deposit which, as the premiums are earned, enures to the benefit of the company accepting the reinsurance. Now that several reinsurance companies have been formed in this State, the question becomes of importance as to whether these companies, which are bound by the provisions of the statute above cited, can allow the unearned premiums upon the reinsurance ceded to them to be held in a special deposit, either in the hands of the ceding company or in the hands of trustees, with the proviso that only so much of the funds should be deliverable to the reinsuring company as exceeds the unearned premium reserve on the business ceded. The Insurance Commissioner is aware of no provision of law which definitely forbids the writing of insurance by a stock company upon the principle that the premium shall be paid over only when and as it is earned, although the form of annual statement set forth in section 101 of chapter 576 of the Acts of 1907 provides for the reporting of gross and net premiums and of unearned premiums.

The question, therefore, which is submitted is whether a Massachusetts company may write reinsurance upon the basis outlined above.

I understand that your inquiry arises as a result of the submission to you for approval by the Eagle Fire Insurance Company of Newark, New Jersey, of a proposed agreement to be entered into by the Eagle Fire Insurance Company and certain Massachusetts reinsuring companies as retrocessionaires. The plan proposed by the Eagle Fire Insurance Company is to accept reinsurance from direct writing companies and then to relieve itself of all but a small fractional part of the risks so assumed by retrocession to allied companies, under a form of reinsurance treaty which requires the retrocessionaires to hold unearned premiums as a trust fund for the reinsurance of the business placed with them by the Eagle Company, to be used in the event of the insolvency of the retrocessionaire or of the impairment of its capital. The evident purpose of this plan is to place the Eagle Company in a position where it will receive a preference with respect to unearned premiums upon the business ceded, as compared with creditors of the retrocessionaire, on account of actual fire losses.

St. 1908, c. 151, reads as follows: —

When a domestic fire insurance company, whether stock or mutual, becomes insolvent, or is unable to pay in full its liabilities as set forth in section eleven of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven, unpaid losses arising from the contingencies insured against by its contracts shall, in the distribution of its assets, whether liquidation is effected by a receiver or otherwise, be deemed and treated as preferred claims over claims for return premiums on uncompleted contracts. But nothing in this act shall impair the obligations now or hereafter imposed by law upon the officers of a mutual company to make assessments to pay all legal obligations of the company.

I am informed by you that it is the usage of insurance companies to collect premiums in advance for the full period of each original policy, but that this usage does not invariably govern contracts of reinsurance. The effect of this usage is to create two classes of creditors, namely, creditors on account of actual fire losses, and creditors on account of the premium which has been already paid although not earned. The purpose of St. 1908, c. 151, is to give fire loss claimants a priority over creditors on account of premium which has been paid but not earned. The purpose of the proposed agreement is to avoid the operation of this statute, in that the premiums upon

the retroceded business, although paid in advance, are held in trust and paid over absolutely to the retrocessionaire only as and when earned. The unearned portion of such premium is repaid to the Eagle Company in the event that the retrocessionaire becomes insolvent or suffers an impairment of its capital. This plan, when coupled with the custom of collecting premiums for the whole period of the policy in advance, results in making the premiums collected in advance from other parties available to pay losses which may be sustained upon the insurance procured from the retrocessionaire by the Eagle Company, although the Eagle premiums are not available to pay the fire losses of those who have thus paid in advance, except in so far as the Eagle premiums have been actually earned. Even if the proposed plan does not conflict with the letter of St. 1908, c. 151, it is, in my opinion, in conflict with the policy therein declared.

But putting aside St. 1908, c. 151, another question is whether the provisions of the proposed agreement can be reconciled with St. 1912, c. 401, § 1, which reads as follows: —

No insurance company transacting in this commonwealth any of the kinds of business specified in section thirty-two of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven, and no agent, sub-agent or broker shall pay or offer to pay or allow in connection with placing or attempting to place insurance any valuable consideration or inducement not specified in the policy contract of insurance, or any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon; or give, sell or purchase or offer to give, sell or purchase in connection with placing or attempting to place insurance anything of value whatsoever not specified in the policy.

The purpose of this act is to prohibit discrimination between those who procure insurance upon substantially similar conditions. In respect to collection of premiums in advance, is there any solid distinction between a direct contract of fire insurance and a contract of reinsurance? The two contracts differ in the nature of the interest insured. In the case of a direct contract of insurance against fire the insurable interest is an interest in the property exposed to the risk of fire. In the case of a contract of reinsurance the insurable interest is a contract of insurance previously made by the company which procures the reinsurance. But if a fire occurs, the payment is

made in each case on account of the loss suffered by reason of such fire. So far as payment of premium in advance is concerned, I do not discern any solid ground of distinction between direct insurance and reinsurance by reason of the difference in the insurable interest already pointed out. In any event, there certainly seems to be no reasonable distinction between contracts of reinsurance procured by the Eagle Company and contracts of reinsurance procured by other companies. If other companies which procure reinsurance pay the reinsurance premium in advance, and so take the risk of insolvency or of impairment of capital on the part of the retrocessionaire, the Eagle Company surely obtains a discrimination if, through the plan already described, it avoids that risk upon the business ceded by it.

I am therefore of opinion that the plan described is not only in conflict with the policy declared by St. 1908, c. 151, but also may involve a discrimination forbidden by St. 1912, c. 401, § 1, and should, therefore, not be approved.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Taxation — War Poll Tax — Exemption — Persons summoned in Draft who were discharged before being mustered into the Federal Service — Abatement of Three Dollar Poll Tax — How to be certified and allowed.

A state of war continues to exist in point of law until terminated by a treaty of peace or by a proclamation of peace, even though an armistice has ended actual hostilities.

Gen. St. 1918, c. 49, as amended by Gen. St. 1919, c. 9, continues in force until the war is terminated either by a treaty of peace or by a proclamation of peace.

The exemption from all poll taxes granted by Gen. St. 1919, c. 9, does not include persons summoned in the draft who reported for duty but were discharged before they were mustered into the Federal service.

St. 1920, c. 609, does not extend to those within its provisions the exemption from all poll taxes conferred by Gen. St. 1919, c. 9.

St. 1920, c. 609, does extend to those within its provisions a right to the abatement of the war poll tax of \$3 imposed by Gen. St. 1919, c. 283, § 9, but application for such abatement must be made within ninety days of the date of the tax bill, as required by St. 1920, c. 608, § 2.

Abatements of the war poll tax of \$3, made under Gen. St. 1919, c. 283, § 9, to those within the provisions of St. 1920, c. 609, may be certified and allowed under St. 1920, c. 552.

JULY 8, 1920.

HON. WILLIAM D. T. TREFRY, *Commissioner of Corporations and Taxation.*

DEAR SIR: — In your letter of June 14, 1920, you ask my opinion upon the following questions: —

1. Is Gen. St. 1918, c. 49, as amended by Gen. St. 1919, c. 9, still in force?

2. Are persons summoned in the draft, who duly reported for duty but who were discharged by reason of physical or mental disability before being mustered into the Federal service, entitled to the exemption from all poll taxes granted by said Gen. St. 1919, c. 9?

3. Are persons within the provisions of St. 1920, c. 609, entitled to an abatement of war poll taxes under Gen. St. 1919, c. 283, § 9, and if so must the application be made as required by St. 1920, c. 608, § 2?

4. May the abatements made under Gen. St. 1919, c. 283, § 9, pursuant to St. 1920, c. 609, be certified and allowed under St. 1920, c. 552?

1. Gen. St. 1918, c. 49, as amended by Gen. St. 1919, c. 9, applies "during the continuance of the war." The latter act was approved on Feb. 17, 1919, over three months subsequent to the armistice. The phrase "during the continuance of the war" cannot, therefore, be construed to mean continuance of hostilities. It must refer to the legal termination of the war. A state of war legally continues until terminated by a treaty of peace or by a proclamation of peace. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 161; *Hijo v. United States*, 194 U. S. 315, 323. Neither of these events has as yet occurred. It follows that Gen. St. 1919, c. 9, was still in force on April 1, 1920, and operated to exempt those within its terms from the \$5 poll tax imposed under Gen. St. 1919, c. 283, § 10. To avoid misconception, I may add that a discharge from the service prior to April 1, 1920, does not affect the operation of the act. The clause "and *thereafter* up to and including the year of their discharge" refers to a discharge subsequent to the termination of the war.

2. Gen. St. 1919, c. 9, applies to those "engaged in the military or naval service of the United States." In my opinion those who have not been mustered into the service are not "engaged" therein, within the meaning of this provision. Those who were sent to camp but failed to pass the physical tests, and so were not mustered into the service, are not entitled to the exemption from poll taxes conferred by Gen. St. 1919, c. 9.

3. St. 1920, c. 609, § 1, provides as follows: —

Every person who was enlisted or inducted into the military service or who was called into the naval service of the United States during the war with Germany and who reported for duty at a mobilization camp, cantonment or naval station subsequent to February third, nineteen hundred and seventeen, and prior to November eighteenth, nineteen hundred and eighteen, shall be deemed to have been mustered into the federal service and to have reported for active duty within the meaning of section two of chapter two hundred and eighty-three of the General Acts of nineteen hundred and nineteen, notwithstanding the fact that such person was subsequently discharged from the draft or from further service on account of physical or mental disability, and if otherwise qualified shall be entitled to the benefits of said chapter two hundred and eighty-three: *provided*, that no benefit shall accrue under this act to a person who was discharged from the said service within thirty days after reporting for duty at such mobilization camp, cantonment or naval station.

I cannot find in St. 1920, c. 609, anything which extends to those within its provisions the exemption from taxation conferred by Gen. St. 1919, c. 9. Exemptions from taxation are not to be lightly inferred, but must appear plainly, either from the express words or necessary intendment of the statute. *Milford v. County Commissioners*, 213 Mass. 162, 165; *Wheelwright v. Tax Commissioner*, 235 Mass. 584. Every section of St. 1920, c. 609, confers on the persons therein defined "the benefits of" Gen. St. 1919, c. 283. No section refers to Gen. St. 1919, c. 9. If it was the intention of the Legislature to confer as well the exemption from taxation granted by the latter act, it would have been easy to have so provided in unmistakable terms. In my opinion, the provision of St. 1920, c. 609, § 1, that the persons therein defined "shall be deemed to have been mustered into the federal service," was inserted for the limited purpose of extending to such persons the benefits of Gen. St. 1919, c. 283, and is not broad enough to include the exemption from taxation conferred by Gen. St. 1919, c. 9.

4. Assuming that St. 1920, c. 609, is constitutional, those persons who come within its terms are "entitled to the benefits of" Gen. St. 1919, c. 283, provided that such persons either actually possess the qualifications prescribed by the latter act or are "deemed" to possess them under the provisions of St. 1920, c. 609. Gen. St. 1919, c. 283, §§ 9 and 10, provide for

the levy of a poll tax of \$5 in the years 1920, 1921, 1922 and 1923, which is in effect an additional *war* poll tax of \$3 levied during those years. Gen. St. 1919, c. 283, § 9, further provides, in part: —

Any person entitled to the benefits of this act shall, upon application to the board of assessors of the city or town in which he resides, receive an abatement of the additional war poll tax assessed upon him under the provisions of this section.

Clearly, the right to apply for and receive an abatement of this war poll tax of \$3 is one of the benefits of Gen. St. 1919, c. 283. I am therefore of opinion that all persons to whom those benefits are extended by St. 1920, c. 609, are entitled to apply for and receive such abatement.

St. 1920, c. 608, § 2, provides as follows: —

No application for an abatement under this act, and no application for abatement made by a veteran of the world war under section nine of chapter two hundred and eighty-three of the General Acts of nineteen hundred and nineteen, shall be considered unless made within ninety days from the date of the tax bill.

It places a limitation upon the right to abatement conferred by Gen. St. 1919, c. 283, § 9. It may be that the word “veteran” is not altogether apt as applied to some, at least, of the persons to whom St. 1920, c. 609, extends the benefits of Gen. St. 1919, c. 283. But those who thus receive the benefits of section 9 of said chapter 283 must take them subject to the limitation placed thereon by section 2 of said chapter 608.

I am therefore of opinion that those who by virtue of St. 1920, c. 609, claim the abatement permitted by Gen. St. 1919, c. 283, § 9, must apply within the ninety days prescribed by St. 1920, c. 608, § 2.

St. 1920, c. 552, expressly applies to abatements granted under Gen. St. 1919, c. 283, § 9. St. 1920, c. 609, grants to those within its terms the benefit of the abatement conferred by Gen. St. 1919, c. 283, § 9. I am of opinion that abatements made under said section 9, pursuant to St. 1920, c. 609, may be certified and allowed under St. 1920, c. 552.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Public Health — Tuberculosis Hospitals — Construction by Counties — Temporary supplying of Hospital Facilities — Counties of less than 50,000 Population.

Gen. St. 1916, c. 286, § 2, gives temporary authority to the county commissioners of any county to make an original contract for the care of tuberculosis patients up to April 1, 1921.

Gen. St. 1916, c. 286, § 5, gives permanent authority which may be exercised subsequently to April 1, 1921, by counties having a population of less than 50,000.

JULY 9, 1920.

EUGENE R. KELLEY, M.D., *Commissioner of Public Health.*

DEAR SIR: — You ask for a construction of Gen. St. 1916, c. 286. You state that “the Department of Public Health maintains that section 2 is to be considered a temporary measure which enables a county to contract for the care of its tubercular citizens for the period until the county may build its own hospital. The department also maintains that section 5 is to be a permanent arrangement for the counties whose population is less than 50,000. The county commissioners of Middlesex County have taken the ground that section 2 applies only to the counties mentioned in section 5, namely, those whose population is under 50,000, and that therefore they could not legally contract for the care of their tubercular citizens, under section 2, as their population is over 50,000.” You request an interpretation of these two sections.

Section 2 reads as follows: —

A contract entered into before January first of the year nineteen hundred and seventeen for a term of years not less than five nor more than twenty-five, and approved by the state department of health after a petition made to the said department and a public hearing thereon, between (a) boards of county commissioners of two adjoining counties, or (b) boards of county commissioners of any county and the legally constituted authorities of any city within the same county, or (c) either county commissioners or the legally constituted authorities of cities of fifty thousand or more inhabitants and the trustees or authorities of any existing or future privately endowed tuberculosis institution, or the trustees of any fund available for the purpose of supplying hospital facilities for persons suffering from consumption, for the express purpose of supplying, within a reasonable time as provided in the conditions of approval of the state department of health, and guaranteeing adequate hospital provision for consumptives

coming under the provisions of this act, shall be held to be satisfactory compliance with the provisions of this act for such counties, sections of counties, or for such cities or classes of individuals, as the case may be, as are designated in the contract; and such contracts shall, subject to the approval of the state department of health, be renewable upon such terms as shall be satisfactory to the contracting parties: *provided, however*, that if such contracts are not renewed and approved by the state department of health at least nine months before their expiration, or if the contracts are renewed and the state department of health shall refuse approval on the ground that by reason of changed circumstances the contract will be inadequate properly to protect the public health of the communities affected by it, and the contracting parties fail within six months before the time when the previous contract expires to agree to a renewal of the contract upon terms approved by the state department of health, the duties and obligations relative to supplying adequate hospital care for such counties, or sections of counties, cities or classes of individuals imposed upon county commissioners and city governments by this act shall be in full force and effect.

In my opinion, section 2 authorizes the county commissioners of any county to make an original contract for the care of tuberculosis patients up to the expiration of the period provided in said section, which was January 1, 1917. This date has, however, been extended by Gen. St. 1919, c. 32, § 1, to April 1, 1921. The clause of said section which reads, "or the legally constituted authorities of cities of fifty thousand or more inhabitants," applies, in my opinion, to cities alone. This view is in accord with two opinions rendered by my predecessor to Commissioner of Health McLaughlin on June 29, 1916, and July 6, 1916, respectively.

The question then arises whether Gen. St. 1916, c. 286, § 5, limits this authority. Section 5 reads as follows: —

County commissioners are authorized and directed, subject to the approval of the state department of health, to erect one or more hospitals within their respective counties to carry out the provisions of this act, or they may in the case of counties having a total population of less than fifty thousand inhabitants, as determined by the latest United States census, arrange to obtain tuberculosis hospital care for those consumptives coming within their jurisdiction by entering into a contract with a tuberculosis institution in a neighboring county in accordance with the provisions of section two. No new tuberculosis hospital shall be erected under the provisions of this act having a total capacity of less than fifty beds.

In my opinion this section does not affect the temporary authority which may be exercised under section 2 by all counties. It does provide a permanent authority which may be exercised subsequently to the date fixed by section 2, or any extension thereof, by counties having a population of less than 50,000. This special grant of authority to counties of less than 50,000 cannot be construed to repeal by implication the more general authority conferred by section 2.

I therefore advise you that the county commissioners of Middlesex County have authority to make an original contract for the care of tuberculosis patients up to April 1, 1921.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Appropriation by Legislature — Date of going into Effect.

An act of the Legislature, authorizing the payment of an annuity, which contains no provision declaring it to be an emergency law, and which provides for the payment of the annuity out of a particular item of an appropriation previously made, is not an appropriation of money, within the meaning of Mass. Const. Amend. XLVIII, *The Referendum*, pt. III, § 2, and does not go into effect until ninety days after it becomes a law.

JULY 9, 1920.

GEORGE LYMAN ROGERS, Esq., *Secretary, Metropolitan District Commission*.

DEAR SIR:— You request my opinion as to the date on which Res. 1920, c. 56, takes effect. Said chapter 56 provides as follows:—

Resolved, The metropolitan district commission may pay the sum of six hundred dollars a year for three years to Isabel M. Ellis, wife of James B. Ellis, a police officer in the employ of the commission, but now incapacitated from the further performance of active duty; also the sum of six hundred dollars a year for three years to Catherine F. McCarthy, widow of Richard M. McCarthy, who died December eighteen, nineteen hundred and eighteen, from illness contracted in the performance of his duties as a member of the metropolitan park police force. Should Catherine F. McCarthy die leaving any minor child or children before the expiration of three years, any balance remaining shall be paid to the guardian of such child or children to the end of the term. The amounts provided for in this resolve shall be paid out of item six hundred and thirty-five of the general appropriation act for the current year.

Mass. Const. Amend. XLVIII, The Referendum, pts. I and II, provide as follows:—

I. No law passed by the general court shall take effect earlier than ninety days after it has become a law, excepting laws declared to be emergency laws and laws which may not be made the subject of a referendum petition, as herein provided.

II. A law declared to be an emergency law shall contain a preamble setting forth the facts constituting the emergency, and shall contain the statement that such law is necessary for the immediate preservation of the public peace, health, safety or convenience. . . .

Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2, provides:—

No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.

Res. 1920, c. 56, authorizes the payment of annuities by the Metropolitan District Commission to the wife of a former employee of the commission and to the widow of another employee of the said commission. It does not set aside any money with which to pay these annuities. It makes reference to a particular item of appropriation previously made by the Legislature (St. 1920, c. 225, item 635) and thereby merely designates a particular appropriation out of which the money may be paid. I am of the opinion that such designation is not within the constitutional provision of Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2, and that said Res. 1920, c. 56, does not appropriate money, within the meaning of said section.

As the said resolve contains no provision declaring it to be an emergency law, and as it has no relation to any of the excluded matter contained in said section 2, I am of the opinion that Res. 1920, c. 56, does not go into effect until ninety days after it became a law.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Elementary, Junior High and High Schools — Compulsory Courses in Civics and History.

Under the provisions of St. 1920, c. 411, all pupils in the elementary schools in the Commonwealth are obliged to take a course in history and a course in civics prior to their graduation from said schools, and at least one course in each of said subjects during their attendance at the public high school. The first two grades of the "junior high schools," so called, are considered as a part of the elementary schools, and the last grade as being a part of the public high schools.

JULY 10, 1920.

DR. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — I am in receipt of your letter in which you request my opinion as to the meaning of St. 1920, c. 411, which provides as follows: —

There shall be taught in all public elementary and high schools in the commonwealth courses in American history and civics for the purpose of promoting civic service and a greater knowledge of American history and of fitting the pupils, morally and intellectually, for the duties of citizenship. All pupils attending the said schools shall be required to take one or more of the courses herein specified at some time during their attendance at said schools.

Under the provisions of R. L., c. 42, § 1, the teaching of American history in the public elementary schools was required, while the teaching of civics in said schools was left within the discretion of the local school committees. The provisions of said section were amended by Gen. St. 1917, c. 169, by virtue of which civil government was removed from those courses which were discretionary with the school committee and made a required course, the same as American history. As pupils in the said elementary schools are obliged to take all of the courses given therein, the effect of the said amendment was to make it obligatory upon all pupils therein to take a course in each of the said subjects prior to their graduation from said schools.

As regards the public high schools, until the enactment of said chapter 411 the teaching of American history and civics was entirely discretionary with the school committee of each city and town. The intention of the Legislature, therefore, in enacting said St. 1920, c. 411, was to extend the provisions of said Gen. St. 1917, c. 169, so as to apply to the public

high schools and to the pupils of the said schools. That being so, I am of the opinion that the word "courses," as used in the first sentence of said chapter 411, was unquestionably intended by the Legislature to mean at least one course in American history *and* at least one course in civics, rather than more than one course in American history and civics combined.

As the words "said schools," in the second sentence of said chapter 411, refer to the public elementary and to the public high schools, and as the courses specified are American history and civics, I am further of the opinion that all pupils attending the public elementary schools must take at least one course in both subjects during their attendance at said schools, and at least one course in both of said subjects during their attendance at the public high schools.

No provision for the establishment of junior high schools is made in our statutes. Their establishment is of recent date, and is entirely discretionary with the local school committees. As at present constituted, the said schools consist of a three-year course. The first two years are equivalent to the two highest grades of the elementary schools, and the courses of study given therein are the same as those provided for in the said upper grades. The last year is equivalent to the first year in the high school and the courses of study are similar to those given in the first year of the high school. In the city of Boston these schools are known as intermediate schools. The mere fact that these schools are called junior high schools in some of the cities and towns of the Commonwealth does not necessarily constitute them high schools within the common and well-understood meaning of the said term and as the term is used in said act.

They are, in fact, a combination of the elementary and high schools, and inasmuch as the first two grades are equivalent to the two upper grades of the elementary schools, I am of the opinion that the first two upper grades of the said schools are to be considered as a part of the elementary schools, and included within the provisions of the said act which apply to the elementary schools, and the last grade as being a part of the public high schools, and included within the provisions of the said act which apply to the high schools.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

State Police — Pension — Consolidation Act.

The provisions of St. 1911, c. 675, § 1, apply to former officers of the District Police who are appointed to the State Police under the provisions of Gen. St. 1919, c. 350, § 101.

JULY 10, 1920.

Col. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You have requested my opinion as to whether or not the provisions of St. 1911, c. 675, § 1, apply to officers appointed by you under the provisions of Gen. St. 1919, c. 350, § 101.

St. 1911, c. 675, § 1, provides: —

Any member of the district police who, in the judgment of the governor, is disabled for useful service in that department, and who is certified by a physician, designated by the governor, to be permanently incapacitated either physically or mentally, by injuries sustained through no fault of his own, in the actual performance of his duty, for the further performance of his duty in the department, and any member of the said department who has performed faithful service for the commonwealth for not less than twenty years, and is, in the judgment of the governor, incapacitated for further service as a member of the said department, shall, if he so requests, be retired, and shall annually receive a pension equal to one half of the compensation received by him at the time of his retirement.

Gen. St. 1919, c. 350, § 101, provides: —

The commissioner shall be the executive and administrative head of the department. He shall have charge of the administration and enforcement of all laws, rules and regulations which it is the duty of the department to administer and enforce, and shall direct all inspections and investigations except as is otherwise provided herein. He shall organize the department in three divisions, namely, a division of state police under his own immediate charge, a division of inspection under the charge of a director to be known as chief of inspections, and a division of fire prevention under the charge of a director to be known as state fire marshal. The state fire marshal and the chief of inspections shall be appointed by the governor, with the advice and consent of the council, for the term of three years, and may, with like approval, be removed. The directors shall receive such annual salary, not exceeding four thousand dollars, as the governor and council may determine. The commissioner may, subject to the civil service law and rules where they apply, appoint, transfer and remove officers, inspectors, experts, clerks and other assistants, and, subject to the provisions of chapter two

hundred and twenty-eight of the General Acts of nineteen hundred and eighteen, and the rules and regulations made thereunder, and to the approval of the governor and council where that is required by law may fix the compensation of the said persons.

Section 4 of said chapter 350 provides as follows: —

Persons who, at the time when this act takes effect, are appointed to or employed by an office, board, commission or other governmental organization or agency abolished by this act, and are appointed to positions in any of the departments established hereby, shall retain all rights to retirement with pension that shall have accrued or would thereafter accrue to them, and their services shall be deemed to have been continuous, as if this act had not been passed. This act shall not be construed to reduce the compensation of present employees who are appointed to positions under the terms of the act where the compensation of such employee is specifically fixed by statute.

Accordingly, it is my opinion that the provisions of said section 1 of chapter 675 do apply to those officers appointed by you under section 101 of said chapter 350, said officers having been appointed by you to take the place of the district police force which was abolished by section 99 of said chapter 350.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Referendum — Appropriation Act.

St. 1920, c. 424, § 1, which increases the salary of certain officers, is not an act which "appropriates money for the current or ordinary expenses of the Commonwealth or for any of its departments, boards, commissions or institutions," within the meaning of Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2.

An appropriation act defined.

An act which contains no emergency preamble and which may be the subject of a referendum petition takes effect ninety days after it becomes a law.

JULY 10, 1920.

MR. WILLIAM D. HAWLEY, *Deputy Auditor of the Commonwealth*.

DEAR SIR: — You request my opinion as to whether St. 1920, c. 424, being an act relative to the practice of dentistry, which was approved by His Excellency the Governor on May 7, 1920, is subject to the ninety-day clause of the Constitution.

St. 1920, c. 424, § 1, provides: —

Chapter three hundred and one of the General Acts of nineteen hundred and fifteen is hereby amended by striking out section three and substituting the following: — *Section 3.* The chairman and secretary of the board of dental examiners shall each receive an annual salary of eight hundred dollars, and the other members of the board shall each receive an annual salary of six hundred dollars. Each member of the board shall receive in addition to his salary his necessary travelling expenses actually incurred in attending meetings of the board: *provided*, that he files an itemized account thereof with the auditor of the commonwealth. The said salaries and expenses shall be paid out of the treasury of the commonwealth. . . .

Mass. Const. Amend. XLVIII, The Referendum, pts. I and II, provide as follows: —

I. No law passed by the general court shall take effect earlier than ninety days after it has become a law, excepting laws declared to be emergency laws and laws which may not be made the subject of a referendum petition, as herein provided.

II. A law declared to be an emergency law shall contain a preamble setting forth the facts constituting the emergency, and shall contain the statement that such law is necessary for the immediate preservation of the public peace, health, safety or convenience. . . .

Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2, provides that —

No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.

The mere passage of an act by the Legislature, the carrying out of which will necessitate the expenditure of moneys from the treasury of the Commonwealth, does not of itself constitute an appropriation. What is necessary is explicit language setting apart or making available a sum of money to be applied towards the carrying out of the particular purposes of the act, or a general appropriation bill in which a

sum of money is set apart or made available to be applied towards expenditures in a particular department or for a particular purpose, as mentioned therein.

St. 1920, c. 424, § 1, increases the salary of the chairman, secretary and members of the Board of Dental Examiners. It does not set aside or make available any money with which to pay these increases. If no further steps had been taken the additional salaries could not be paid. This additional step was later taken by St. 1920, c. 225, item 405. By this later enactment the Legislature recognized that St. 1920, c. 424, § 1, is not an act which "appropriates money," within the constitutional provision.

As St. 1920, c. 424, § 1, is not an emergency measure and does not contain any provision which fixes the date when the increases shall take effect, and as it does not come within any of the excluded matters contained in said section 2 of part III, quoted above, and is therefore the subject of a referendum petition, I am of the opinion that this statute does not take effect until ninety days after it became a law, and that the increases do not become effective until that time.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Constitutional Law — Political Party — Offices — Women.

Members of ward, town and city committees and delegates to State conventions are not public officers, and the selection of such members and delegates is subject to no constitutional inhibition.

St. 1913, c. 835, as amended by Gen. St. 1919, c. 269, does not prohibit the selection of women to be members of ward, town or city committees or delegates to State conventions.

Under U. S. Const., art. II, § 1, cl. 2, a State Legislature may permit the appointment of a woman as a presidential elector, or to be a delegate to a convention which nominates such electors.

JULY 12, 1920.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth*.

DEAR SIR:— You have requested my opinion as to the right of women to be members of ward and town committees and to be delegates to a State convention.

St. 1913, c. 835, § 89, as last amended by Gen. St. 1919, c. 269, § 9, provides:—

Each political party shall, in every ward and town, elect at the primaries before each biennial state election, a committee to be called a ward or a town committee, to consist of not less than three persons, who shall hold office for two years from the first day of January next following their election and until their successors shall have organized.

The members of the several ward committees of a political party in a city shall constitute a committee to be called a city committee.

Each town committee shall, between the first day of January and the first day of March next following their election, and each ward and city committee shall, within thirty days after the beginning of its term of office, meet and organize by the choice of a chairman, a secretary, a treasurer and such other officers as it may decide to elect. At such meeting the committee may add to its numbers.

The secretary of each city and town committee shall, within ten days after its organization, file with the secretary of the commonwealth, with the city or town clerk and with the secretary of the state committee of the political party which it represents, a list of the officers and members of the committee.

A vacancy in the office of chairman, secretary or treasurer of a city, ward or town committee shall be filled by the committee, and a vacancy in the membership of a ward or town committee shall be filled by such committee, and a statement of any such change shall be filed as in the case of the officers first chosen.

St. 1913, c. 835, § 92, provides:—

A state, city or town committee may make rules and regulations, not inconsistent with law, for its proceedings and relative to caucuses called by it, and may fix the number of persons of whom it shall consist, which number shall be announced in the call for the meeting at which they are to be chosen. Each city or town committee may make reasonable regulations, not inconsistent with law, to determine membership in the party, and to restrain persons not entitled to vote at caucuses from attendance thereat or taking part therein. But no political committee shall prevent any voter from participating in a caucus of its party for the reason that the voter has supported an independent candidate for political office. A state committee may make rules and regulations, not inconsistent with law, for calling conventions.

Section 126 of said chapter 835 reads as follows:—

A political party may, upon the call of its state committee, but not earlier than one week nor later than two weeks, after the holding of the primaries, hold a state convention for the purpose of adopting a platform, electing such number of members at large of the state committee as may be fixed by the state committee, nominating presidential elec-

tors, and for such other purposes not inconsistent with this act as the state committee or the convention may determine. Such convention shall consist of the delegates elected at the state primary (in number not less than one for each ward and town), the members of the state committee, the United States senators from Massachusetts who are members of the party, the nominees of the party for all offices to be filled at the state election, and in years in which no elections are held for such offices, the incumbents of those offices who are members of the party.

Ward, town and city committees are political committees in which is vested a share of the government of a political party; but since the members of such committees exercise no portion of the sovereign power, they are not public officers, and the fact that the Legislature regulates their conduct by statute does not make them public officers. *Attorney-General v. Drohan*, 169 Mass. 534. *Lewis and Putney Handbook on Election Law*, § 18.

The election laws, which include the regulation of political committees, are intended "to enable those who have the elective franchise to exercise it freely and safely and to make it certain that the will of the electors thus exercised shall be truly ascertained and given effect." *Jaquith v. Selectmen of Wellesley*, 171 Mass. 138, 142. Delegates to a State convention also exercise a share in the government of a political party, but are not entrusted with any portion of the sovereign power.

Broadly speaking, the convention is the judge of its membership. Our statutes in the case of both local committees and State conventions provide that the party shall control the membership in such committees and conventions. St. 1913, c. 835, §§ 92 and 126. Such statutory regulations as exist go no farther "than to prevent error and fraud, to secure order and regularity in the conduct of elections, and thereby give more security to the right itself." *Capen v. Foster*, 12 Pick. 485; *Kinneen v. Wells*, 144 Mass. 497; *Commonwealth v. Rogers*, 181 Mass. 184.

The Constitutions both of the United States and of the Commonwealth of Massachusetts are concerned with public officers and the right of the elective franchise by which certain public officials are chosen, but they contain no mention of political parties or the committees or conventions thereof. Except as limited by the provisions of the Fifteenth Amendment to the Constitution of the United States, the qualifica-

tions of voters are determined either by our own Constitution or, in certain special cases, by statute. *Kinneen v. Wells*, 144 Mass. 497; *Opinion of the Justices*, 115 Mass. 602; II Op. Atty.-Gen. 469. But as the officers in question are not public, and as the incumbents thereof are not public officials, it is clear that there is no constitutional inhibition against choosing as a committeeman or delegate whatever person the party members desire. The person so chosen exercises in the performance of his duties and privileges no elective franchise.

Since there is no constitutional objection to women serving on ward or town committees or as delegates to a State convention, we must examine the statutes to see if they are in any way precluded thereby from acting as such.

St. 1913, c. 835, § 89, quoted above, provides that the committee shall consist of "not less than three persons," and section 92 provides that "such committee may make regulations not inconsistent with law for its proceedings and to determine membership in the party."

The word "person" is not made the subject of special definition in the election laws, and so has no narrow and technical signification. The provisions as to the elective franchise depend not upon membership in a political party but upon being a "voter," which is defined as a "registered male voter." Mass. Const. Amend. III; St. 1913, c. 835, § 1.

The word "person," like the word "citizen," is broad enough to include both men and women. See *Minor v. Happersett*, 21 Wall. 162. I find no good reason for reading a sex limitation into the present section. But *cf.* an opinion of the Attorney-General, dated Feb. 10, 1920, to His Excellency Calvin Coolidge. In some instances the rules and regulations adopted by the committee or convention may be so drawn as to exclude women, but that is a matter for it to decide.

It is therefore my opinion that neither the Federal nor the State Constitution nor the laws of the Commonwealth forbid women to be members of ward or town committees or delegates to a State convention.

Assuming that women delegates have been elected, a question might arise as to their right to nominate presidential electors. This question is not directly raised by your inquiry, but the answer thereto is pertinent to the issue already considered in this opinion.

U. S. Const., art. II, § 1, par. 2, provides that "each state shall appoint, in such manner as the legislature thereof may direct," electors for president and vice-president. As this power is conferred upon the States by the Federal Constitution, it must be exercised in conformity therewith. But a wide choice as to the mode of exercise is given to the State Legislatures. Such appointment may be made by the Legislature directly or by popular vote in districts or by general ticket, as the Legislature may provide. *McPherson v. Blacker*, 146 U. S. 1. As a practical matter, most of the States appoint such electors by popular vote, either by districts or by general ticket, some States having one provision and some the other.

Under the doctrine of *McPherson v. Blacker*, *supra*, the Legislature might, in my opinion, appoint a woman as a presidential elector. It might equally permit the people to appoint her by their ballots. If so, it seems clear that the Legislature may permit a woman to sit and vote in the convention which nominates such electors. It has already been shown that our Legislature allows the party to determine who shall sit in the party convention. It follows that women may sit as delegates if the party so permits. I am therefore of opinion that the appointment of an elector could not successfully be assailed because women participated as delegates in the convention which nominated such elector. Moreover, unless a candidate actually lost the nomination as elector through the votes of women delegates, he would have no ground for complaint. *Mansfield v. Hutchings* (House, 1886); *Howard v. Neill* (Senate, 1889); *Andrews v. Gardner* (House, 1900); all reported in Massachusetts Election Cases. And if he did complain it would seem that the action of the convention in seating such delegates may well be conclusive. *Walling v. Lansdon*, 15 Ida. 282; *State v. Liudahl*, 11 N. D. 320; *In re Fairchild*, 151 N. Y. 359. On all grounds, therefore, it is my opinion that women may be admitted by a party to its party convention, and if so admitted, may lawfully participate in nominating presidential electors.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Taxation — Income Tax — Stock Dividend.

A stock dividend paid before Jan. 1, 1919, omitted from a taxpayer's return, is taxable after the passage of St. 1920, c. 352, exempting stock dividends received in 1919 and thereafter.

There is nothing in the Federal law or decisions forbidding this Commonwealth to tax stock dividends.

JULY 14, 1920.

IRVING L. SHAW, ESQ., *Income Tax Director, Department of Corporations and Taxation.*

DEAR SIR: — A foreign corporation declared on Nov. 30, 1917, a stock dividend in new common stock of the same company. A Massachusetts taxpayer who received this stock omitted to include it in his tax return for 1918, and the omission has been discovered by a recent audit. You ask my opinion as to whether he is now taxable on account of said dividend.

In 1918, Gen. St. 1916, c. 269, § 2, par. (b), was in force. This paragraph, in combination with the first sentence of section 2, reads, in part, as follows: —

Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent per annum:

(b) Dividends on shares in all corporations . . . organized under the laws of any state . . . other than this commonwealth, except . . .

The constitutionality of this provision was upheld in *Tax Commissioner v. Garfield*, 227 Mass. 522. In that case a stock dividend, declared out of an accumulation of earnings invested, prior to the passage of the income tax act in permanent plant additions, was held taxable as income, within the meaning of Mass. Const. Amend. XLIV.

On March 8, 1920, the Supreme Court of the United States, in deciding the case of *Eisner v. Macomber*, 252 U. S. 189, followed the reasoning of *Towne v. Eisner*, 245 U. S. 418, and held that dividends in stock of the issuing corporation were not income, within the meaning of the Sixteenth Amendment to the Constitution of the United States.

On April 23, 1920, chapter 352 of the Acts of 1920 was approved by the Governor. This act amended paragraph (b), *supra*, so as to read: —

Dividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations . . . organized under the laws of any state . . . other than this commonwealth, except . . .

Section 2 of the same act provided: —

This act shall take effect as of the first day of January, nineteen hundred and twenty, and shall apply to dividends received in the year nineteen hundred and nineteen as well as in the current year and in all subsequent years.

From the limitation in section 2 it is clear that the provisions of paragraph (b) of section 2 of the 1916 act, so far as they provide for the taxation of stock dividends, are not repealed but are made inoperative only as regards such dividends received in 1919 and subsequent years; and that the taxpayer mentioned in your letter is liable for a tax under the provisions of the 1916 law unless *Eisner v. Macomber* overrules *Tax Commissioner v. Garfield*.

Although "the Massachusetts income tax amendment . . . is substantially identical with the Federal amendment" (dissenting opinion of Justice Brandeis, *Eisner v. Macomber*), the majority of the court, while refusing to accept the reasoning in the cases of *Tax Commissioner v. Putnam* and *Tax Commissioner v. Garfield*, 227 Mass. 522, remarked that "the Massachusetts court was not under any obligation like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction." Earlier in their opinion the majority discussed at some length the "other constitutional provisions" (Federal Income Tax Service, 1920, §§ 2584 to 2588, inclusive), and also distinguished the case of *Swan Brewery Co., Ltd., v. Rex* (1914), A. C. 231.

The Garfield case determined the meaning of the word "income," as used in our State Constitution. That is a question of State law upon which the Supreme Court accepts the decision of the State court. *Smiley v. Kansas*, 196 U. S. 447, 455. The Federal question which would then arise under the Garfield case is whether the State Constitution, as so construed by the State court, is in conflict with the Federal Constitution. *Eisner v. Macomber* does not decide that

question, and does not warrant any inference that the Federal Constitution forbids Massachusetts to tax stock dividends.

It therefore follows that the taxpayer referred to should be required to pay a tax on such stock, and should be assessed therefor under the provisions of Gen. St. 1916, c. 269, § 14.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Taxation — Income Tax — Exemption — Stock Dividend by Trust, the Beneficial Interest in which is represented by Transferable Shares.

St. 1920, c. 352, exempts from taxation as income a stock dividend declared in 1919 by an association, the beneficial interest in which is represented by transferable shares.

JULY 14, 1920.

IRVING L. SHAW, ESQ., *Income Tax Director, Department of Corporations and Taxation.*

DEAR SIR: — An association, the beneficial interest in which is represented by transferable shares, issued in 1919 a dividend in new stock of the association. The association has not filed an agreement to pay taxes, and dividends paid to shareholders are taxable in accordance with the provisions of Gen. St. 1916, c. 269, § 2, par. (c). You have asked my opinion whether the stock dividend declared in 1919 is taxable.

The material portion of Gen. St. 1916, c. 269, § 2, paragraphs (b) and (c), prior to the amendment of said section by St. 1920, c. 352, provided as follows: —

Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent per annum.

.
(b) Dividends on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth, except, . . .

(c) Dividends on shares in partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, except . . .

In *Tax Commissioner v. Putnam*, 227 Mass. 522, decided in June, 1917, it was held that a stock dividend paid in new

stock of the corporation issuing the same was "income," within the meaning of Mass. Const. Amend. XLIV, and was taxable under this section.

The material portion of St. 1920, c. 352, entitled "An Act to exempt stock dividends from taxation as income," provides as follows: —

SECTION 1. Section two of chapter two hundred and sixty-nine of the General Acts of nineteen hundred and sixteen, as amended by chapters seven and one hundred and twenty of the General Acts of nineteen hundred and eighteen and as affected by chapter one hundred and fifty of the General Acts of nineteen hundred and eighteen, is hereby further amended by inserting after the word "dividends," in the first line of paragraph (b), the words: — other than stock dividends paid in new stock of the company issuing the same, — so that said paragraph will read as follows: — (b) Dividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth, . . .

SECTION 2. This act shall take effect as of the first day of January, nineteen hundred and twenty, and shall apply to dividends received in the year nineteen hundred and nineteen as well as in the current year and in all subsequent years.

It will be observed that said chapter 352 in terms amends paragraph (b) of section 2 of said chapter 269, and is silent as to paragraph (c) of said section.

The stock dividend in question was paid in 1919 by an association described in paragraph (c). The question, therefore, is whether the exemption conferred by St. 1920, c. 352, includes by implication stock dividends paid in the shares of the partnership, association or trust which issues them.

Exemptions from taxation are not to be lightly inferred but must appear plainly, either from the express words or necessary intendment of the statute. *Milford v. County Commissioners*, 213 Mass. 162, 165; *Wheelwright v. Tax Commissioner*, 235 Mass. 584. But the manifest intention of the Legislature, as gathered from its language, considered in connection with the existing situation and the object aimed at, is to be carried out. *Moore v. Stoddard*, 206 Mass. 395, 398; *Bergeron, Petitioner*, 220 Mass. 472, 475. The title of the act (*Wheelwright v. Tax Commissioner, supra*) and the state of the law prior to its passage (*Bergeron, Petitioner*, 220 Mass. 472, 475) may both be considered in order to ascertain the

legislative purpose. If that intent can be determined with reasonable certainty, and a literal construction of the act would produce an unreasonable and unjust result, inconsistent with such intent, the intent must prevail over the strict letter. *Stanicls v. Raymond*, 4 Cush. 314, 316; *Somerset v. Dighton*, 12 Mass. 383, 384; *Burlingame v. Bell*, 16 Mass. 318, 319; *Church of Holy Trinity v. United States*, 143 U. S. 457, 461.

The state of the law prior to the passage of St. 1920, c. 352, is very significant. As has already been pointed out, *Tax Commissioner v. Putnam*, 227 Mass. 522, decided in June, 1917, held that stock dividends paid by a corporation in its own stock were "income," and were taxable under Gen. St. 1916, c. 269, § 2. *Towne v. Eisner*, 245 U. S. 418, decided in January, 1918, held that such stock dividends were not "income," within the meaning of the Federal income tax act of Oct. 3, 1913, 38 Stat. 114, 166, 167, and were not taxable thereunder. *Eisner v. Macomber*, 252 U. S. 189, held that such stock dividends were not "income," within the meaning of the Sixteenth Amendment to the Federal Constitution, and could not constitutionally be taxed thereunder. The reasoning of the court in both cases was that such a stock dividend does not enrich the stockholder, since it leaves unchanged his proportional interest in the corporation, and simply evidences a transformation of surplus and undivided profits into capital by additional stock certificates. Neither decision, of course, controls or modifies *Tax Commissioner v. Putnam*, *supra*, since neither determines the power of Massachusetts to tax income under its own Constitution. The result, therefore, was that Massachusetts taxed such stock dividends, while the United States did not.

St. 1920, c. 352, was approved on April 23, 1920, about seven weeks after the decision in *Eisner v. Macomber*, *supra*, was rendered. It is entitled "An Act to exempt stock dividends from taxation as income." The language of the title is broad enough to include stock dividends issued by partnerships, associations and trusts having transferable shares. The words inserted by the amendment, namely, "other than dividends paid in new stock of the company issuing the same," in no way exclude stock dividends paid by partnerships, associations and trusts, since the word "company" is broad enough to apply both to incorporated and unin-

corporated associations. These circumstances, and the broad language of both title and amendment, indicate, in my opinion, that the intention of the Legislature was to exempt all stock dividends from taxation as income, and thereby to bring our tax law into harmony in this respect with the Federal income tax law.

To construe the exemption as applicable to stock dividends paid by corporations and joint stock companies only would produce results so unjust and unreasonable that such an intention should not be imputed to the Legislature, if it can be avoided. A stock dividend paid by a partnership, association or trust in its own shares differs in no essential particular from a similar dividend paid by a corporation or joint stock company. Under this narrow construction the one would be taxable as "income," the other would not be taxable as "income." The distinction would be based, not upon any difference in the nature of the dividend or in the nature of the property from which it is derived, but solely upon the legal form of the organization which pays it. If the tax were upon the organization, such a distinction may be supported. *Eliot v. Freeman*, 220 U. S. 178. But where the tax is upon the thing paid and not upon the party who makes the payment, a distinction which makes the taxability of stock dividends depend upon whether the organization which pays them does or does not possess a charter or franchise is not to be supported if the act is susceptible of a more just construction.

Indeed, such a construction would raise a very serious constitutional question. Mass. Const. Amend. XLIV, provides, in part: —

Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements.

The tax on dividends is a tax upon income derived from invested capital. It is therefore a tax upon income derived from property. The amendment permits the tax to be "at

different rates upon income derived from different classes of property," but requires that it be uniform "upon income derived from the same class of property." See *Tax Commissioner v. Putnam*, 227 Mass. 522, 531, 532. The construction suggested does not classify stock dividends with reference to the nature of the property from which they are derived, but with reference to whether the organization which pays them is incorporated or unincorporated. It may well be that such a classification is not permitted by Amendment XLIV. Conceivably, also, such a classification might be held to be arbitrary, under the Fourteenth Amendment to the Federal Constitution. As the evident purpose of the Legislature was to rectify what it deemed to be an injustice, I do not feel justified in placing upon the act a construction which not only lays it open to serious constitutional attack, but also perpetrates a still greater injustice.

I therefore advise you that, in my opinion, the "necessary intendment" of St. 1920, c. 352, is to exempt stock dividends paid by partnerships, associations and trusts in the shares of the company issuing the same, and therefore that the dividend in question is not taxable.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Public Health — Notice of Contagious Diseases — Physician.

The notice of contagious disease, required by R. L., c. 75, § 50, to be given by the attending physician, should be given to the authorities of the city or town in which the patient is under treatment, rather than to the authorities of the city or town where the patient resides.

JULY 22, 1920.

BERNARD W. CAREY, M.D., *Deputy Commissioner of Public Health*.

DEAR SIR: — R. L., c. 75, § 50, as amended by St. 1907, c. 480, § 1, provides: —

If a physician knows that a person whom he is called to visit is infected with smallpox, diphtheria, scarlet fever or any other disease declared by the state board of health to be dangerous to the public health, or if one or both eyes of an infant whom or whose mother he is called to visit become inflamed, swollen and red, and show an unnatural discharge within two weeks after the birth of such infant, he shall immediately give notice thereof in writing over his own signature

to the selectmen or board of health of the town; and if he refuses or neglects to give such notice, he shall forfeit not less than fifty nor more than two hundred dollars for each offence.

In reply to your question whether the report required shall be made to the authorities of the town where the physician practices or of the town where the patient dwells, I am of opinion that it should be made to the authorities of the town where the patient is under treatment. The purpose of the act is to afford protection to a community against an infection, and so safeguard the public health, and it is therefore clear that the information should be given to the selectmen or board of health of the town in which he is attending the patient.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

*Wrentham State School — Temporary Leave of Absence —
Discharge.*

An inmate who is permitted to leave the Wrentham State School temporarily, in the custody of her father, and who wilfully absents herself from such custody within one year, remaining absent from the school for more than a year, is not deemed to be discharged under the provisions of St. 1909, c. 504, § 75, as amended.

JULY 22, 1920.

ELLERTON JAMES, Esq., *Secretary, Trustees of the Wrentham State School*.

DEAR SIR: — You state the following facts: An inmate of the Wrentham State School is permitted to leave the institution temporarily, in charge of her father, and before the expiration of a year she absents herself from her father's home and custody and remains absent until more than a year has elapsed since she left the school. You request my opinion whether she shall be deemed to be discharged.

St. 1909, c. 504, § 75, as finally amended by Gen. St. 1917, c. 48, § 1, provides: —

The superintendent or manager of any hospital or receptacle described in section seven may permit any inmate thereof temporarily to leave such institution in charge of his guardian, relatives, friends, or by himself, for a period not exceeding twelve months, and may receive him when returned by any such guardian, relative, friend, or upon his own

application, within such period, without any further order of commitment. The superintendent may require as a condition of such leave of absence, that the person in whose charge the patient is permitted to leave the institution shall make reports to him of the patient's condition. Any such superintendent, guardian, relative or friend may terminate such leave of absence at any time and authorize the arrest and return of the patient. The officers mentioned in section eighty-six shall cause such a patient to be arrested and returned upon the request of any such superintendent, guardian, relative or friend. Any patient who has not returned to the institution at the expiration of twelve months shall be deemed to be discharged therefrom.

Assuming that the superintendent was informed of the escape, if I may call it that, before the expiration of a year, and promptly attempted to recover custody of the former inmate, the superintendent would be deemed to have terminated the leave of absence, within the meaning of the statute, and when he located the patient he could resume custody of her without further proceedings. Her situation after termination of her leave of absence would be the same as that of any other escaped inmate.

Assuming, however, that the superintendent did not take steps to recover the girl until he learned of her whereabouts, perhaps more than a year after her departure from the school, I should still be of opinion that he might resume custody of her. The quoted statute permits the superintendent to substitute for his own active control the control of a parent, guardian, relative or friend; the patient is not discharged by the temporary release, but the superintendent's control over her is qualified while she remains absent. An escape from this qualified control is still an escape. The statute plainly contemplates that the period of release not exceeding one year shall be passed by the patient in the charge of the person designated by the superintendent and under the qualified control of the superintendent, so that she may be closely observed and her leave of absence terminated if her best interests so require. A year passed under conditions that do not permit this observation and do not permit any control whatever by the superintendent or the person designated by him to be in charge of the patient does not satisfy the requirements of the statute.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Parks and Reservations — Delegation of Duty to enforce Game Laws.

The officials in charge of reservations, parks, etc., cannot delegate to the Division of Fisheries and Game the duty imposed upon them by St. 1909, c. 362, § 2, to prevent hunting without a license in such reservations, parks, etc.

But the Division of Fisheries and Game must enforce the game laws in such reservations, parks, etc., as in other parts of the Commonwealth.

JULY 27, 1920.

MR. WILLIAM C. ADAMS, *Director, Division of Fisheries and Game, Department of Conservation.*

DEAR SIR: — St. 1909, c. 362, § 1, provides that no person shall hunt or destroy wild birds or game “within the exterior boundaries of any state reservation, park, common or any land held in trust for public use,” except that the authorities having control of such lands may issue licenses to hunt birds or game “not now protected by law.” Section 2 provides that “the boards, officials and persons having charge of reservations, parks, commons and lands held for public use shall enforce the provisions of this act.” In your letter of July 8, 1920, you request my opinion whether such boards, officials and persons may delegate their authority and duty to enforce the act to the Division of Fisheries and Game.

I am of opinion that the duty imposed by the statute upon officials in charge of public parks and other public lands is unconditional and very definite, and that such officials cannot delegate their statutory duty to the Division of Fisheries and Game or any other agency. If the law were otherwise, any public officer could avoid performing his duties by the expedient of delegating them to some other person or agency, perhaps even to a private individual. Moreover, the provisions of our Constitution and statutes relative to the duties of public officers, departments and boards and to the distribution of governmental powers would be set at naught, and various persons would be exercising governmental powers with no legislative authority therefor. I think there is no escape from the principle that public officers who have duties imposed upon them by law must perform those duties, and persons who do not have duties imposed upon them by law are not authorized to perform the duties imposed upon others.

This does not mean, however, that the Division of Fisheries

and Game has no jurisdiction to protect wild birds and game within the boundaries of public parks and similar lands. R. L., c. 91, § 4, provides: —

The commissioners and their deputies, members of the district police and all officers qualified to serve criminal process may arrest without warrant any person whom they find violating any of the fish or game laws, except that persons engaged in the business of regularly dealing in the buying and selling of game as an article of commerce shall not be so arrested for having in possession or selling game at their usual places of business.

It will be observed that this statute contains no words excepting from its operation the lands in question. It will also be observed that the act of 1909 does not impose upon persons in charge of public parks and similar lands a duty to enforce the game laws, but rather a duty to prevent *any* killing of wild birds within the boundaries of lands controlled by them, whether such killing is or is not done in violation of the game laws. It follows that the Division of Fisheries and Game, which is the legal successor of the Commissioners on Fisheries and Game, may exercise within the boundaries of public parks, reservations, *et cetera*, whatever powers it has to enforce the game laws, although, if the game laws are not violated, only the persons in charge of parks, reservations, *et cetera*, have power to prevent the killing thereon of wild birds and game.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Taxation — War Poll Tax — Abatement — Persons who receive Bonus payable to Dead Soldier or Sailor, had he lived.

A person who becomes entitled under Gen. St. 1919, c. 283, § 3, to the bonus to which a dead soldier or sailor would have been entitled under section 2 of said act if he had lived, is not entitled to the \$3 abatement of war poll taxes allowed by section 9 of said act.

JULY 28, 1920.

HON. WILLIAM D. T. TREFRY, *Commissioner of Corporations and Taxation*.

DEAR SIR: — You inquire whether persons who, under Gen. St. 1919, c. 283, § 3, receive the \$100 bonus which would

have been payable, had he lived, to a person within the provisions of section 2 of said act, are entitled to the \$3 abatement of war poll taxes allowed by section 9 of said act.

Section 2 of said act provides as follows: —

Upon application, as hereinafter provided, there shall be allowed and paid out of the treasury of the commonwealth, to each commissioned officer, enlisted man, field clerk and army or navy nurse duly recognized as such by the war or navy department, who was mustered into the federal service and reported for active duty subsequently to February third, nineteen hundred and seventeen and prior to November eleventh, nineteen hundred and eighteen, and to each commissioned officer, warrant officer, nurse and enlisted man, who enlisted or was enrolled in, or was mustered into the federal service and who had been called and reported for active duty in the United States Navy, United States Naval Reserve Forces, United States Marine Corps, United States Coast Guard, or the National Navy Volunteers, subsequently to said February third, and prior to said November eleventh, and to every man who served during the war in the regular army, navy or marine corps, or to the dependents or heirs at law of the persons above enumerated, as provided in section three, the sum of one hundred dollars: *provided*, that every person on account of whose service the application is filed had been a resident of the commonwealth for a period of not less than six months immediately prior to the time of his entry into service; and *further provided*, that no benefits shall accrue under this act because of the service of any person appointed to or inducted into the military or naval forces who had not reported for duty on or prior to November eleventh, nineteen hundred and eighteen at the military cantonment or the naval station to which he was ordered, or who was discharged from service or relieved from active duty and not recalled to the colors prior to January fifteenth, nineteen hundred and eighteen, but in all cases of death in service or discharge for physical incapacity received in the line of duty the full amount of one hundred dollars shall be payable notwithstanding the provisions of this section.

Section 3 of said act provides as follows: —

In the case of the decease of any person who would if alive be entitled to the benefits of this act, the sum named therein shall be paid to his dependents, if any, and otherwise to his heirs-at-law: *provided*, that if there is more than one dependent, or heir-at-law, payments shall in either case be made in such proportions as the treasurer and receiver-general shall determine, and in determining the order of precedence so far as practicable the following order shall be observed: wife and children, mother or father, brother or sister, other dependents; *provided, however*, that no right or payment under this act shall be subject

to the claims of creditors, capable of assignment, regarded as assets legal or equitable of the estate of the deceased or made the basis for administration thereof.

The material portion of section 9 of said act provides: —

. . . Any person entitled to the benefits of this act shall, upon application to the board of assessors of the city or town in which he resides, receive an abatement of the additional war poll tax assessed upon him under the provisions of this section.

Section 10 amends St. 1909, c. 490, pt. I, § 1, so as to read as follows: —

In and for the years nineteen hundred and twenty, nineteen hundred and twenty-one, nineteen hundred and twenty-two and nineteen hundred and twenty-three a poll tax of five dollars and thereafter a poll tax of two dollars shall be assessed on every male inhabitant of the commonwealth above the age of twenty years, whether a citizen of the United States or an alien.

The precise question, therefore, is whether the person or persons who under sections 2 and 3 receive the bonus which would have been payable to the dead soldier or sailor, had he lived, are persons "entitled to the benefits of this act," within the meaning of section 9.

There can be no question as to the class for whose benefit the act was passed. It is entitled "An Act to provide suitable recognition of those residents of Massachusetts who served in the army and navy of the United States during the war with Germany." The title is, in a legal sense, a part of every act, and may be considered in determining its construction. *Wheelwright v. Tax Commissioner*, 235 Mass. 584. The title is reinforced by the preamble, which declares that the purpose of the act is "to provide prompt recognition of Massachusetts men upon their discharge from the military and naval forces of the United States." Section 1 further declares: —

In order to promote the spirit of patriotism and loyalty, in testimony of the gratitude of the commonwealth, and in recognition of the services of certain residents of Massachusetts in the army and navy of the United States during the war with Germany, to the full extent of the demands made upon them and of their opportunity, the payments hereinafter specified are hereby authorized.

Section 2 requires that the recipient of the bonus, in his own right, shall have been actually mustered into or enrolled in certain designated branches of the Federal service, and have reported for active duty subsequent to Feb. 3, 1917, and prior to Nov. 11, 1918, and further, must not have been discharged therefrom prior to Jan. 15, 1918, except by death or on account of physical incapacity received in line of duty. See opinion rendered to you under date of July 9, 1920. Taking these provisions together, it is plain, in my opinion, that the Legislature intended that those who, *in their own right*, should be entitled to the benefits of the act should be those who were mustered into the Federal service and reported for active duty therein.

The right to the bonus conferred by section 3 is of purely derivative character. Those within this section have not rendered the active service which the Legislature intended to recognize and reward. They must claim, either as dependents or heirs-at-law, under one "who would if alive be entitled to the benefits of this act." By this significant phrase the Legislature has, in my opinion, distinguished between those who by reason of active service are entitled "to the benefits of this act" and those who receive the bonus or some part thereof in a purely representative capacity.

This representative right to the bonus is not absolute. If there be more than one dependent or heir-at-law, the Treasurer and Receiver-General determines not only who shall receive the bonus, but the proportions in which it shall be paid. Until he acts no one is "entitled" to anything. I cannot believe that the Legislature intended that a discretionary award of some part of the bonus to a relative, conceivably quite remote in point of blood, should carry as an incident an exemption from the war poll tax. Indeed, a contrary conclusion might well cause the derivative right to rise higher than its source. The dead soldier or sailor would have been entitled, had he lived, to an abatement of his own war poll tax only. If the bonus be distributed among several relatives and carry to each, as an incident, a right to the abatement of the war poll tax, several abatements might well be engrafted on the single original stem.

Finally, we may inquire what was the purpose of the abatement authorized by said section 9. Section 9 provides for special taxes to raise part of the \$20,000,000 required to meet

the bonus. Among these special taxes was a "civilian war poll tax" of \$3 which, under section 10, is to be levied in the years 1920, 1921, 1922 and 1923. The plain intent is to place a special tax upon those males of twenty years and upwards who stayed at home for the benefit of those Massachusetts residents who went to war. Those who take under section 3 are civilians who, if males of over twenty, would be required to pay this additional poll tax unless exempted. Exemptions from taxation are not to be lightly inferred, but must appear plainly from the express words or necessary intendment of the statute. *Milford v. County Commissioners*, 213 Mass. 162, 165; *Wheelwright v. Tax Commissioner*, 235 Mass. 584. I am unable to reach the conclusion that the necessary intendment of the act is to exempt these civilians simply because they profit financially through the death of some soldier or sailor upon active service.

I therefore advise you that those who receive the bonus, or some part thereof, under section 3 are not entitled to the abatement allowed by section 9.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Retirement — Veteran.

A veteran, as defined in St. 1920, c. 574, is eligible to remain a member of the Retirement Association established by St. 1911, c. 532.

One who is eligible to retire both under St. 1920, c. 574, and under St. 1911, c. 532, must elect as to whether he will retire under the one or under the other.

If a veteran eligible to retire under St. 1920, c. 574, is also a member of the Retirement Association established by St. 1911, c. 532, and elects to retire and is retired under St. 1920, c. 574, he is entitled to the refund granted by St. 1911, c. 532, § 6, par. A, cl. (a).

JULY 28, 1920.

Division of Board of Retirement, Department of the Treasurer and Receiver-General.

GENTLEMEN:— You request my opinion as to whether a person who is a member of the Retirement Association established by St. 1911, c. 532, as amended, is eligible to remain a member of said association if he is a veteran, as

defined by St. 1920, c. 574, and if he is not, whether the Board of Retirement is required to release his membership and refund to him the money paid in by him as a member of said association.

By St. 1911, c. 532, and subsequent amendments, a contributory retirement system was established for the civil employees of the Commonwealth. All employees of the Commonwealth on the date when the system was established were enabled to become members thereof, if they so desired. Unless said employees notified the Insurance Commissioner, in writing, within thirty days of the date when the system was established, that they did not desire to join the association, said employees automatically became members thereof. All employees who entered the service of the Commonwealth after the date when the retirement system was established, with certain exceptions which it is unnecessary here to enumerate, became members of the Retirement Association after completing ninety days' service in the employ of the Commonwealth.

St. 1911, c. 532, § 3, pars. (3), (4) and (5), provide: —

(3) No officer elected by popular vote may become a member of the association, nor any employee who is or will be entitled to a pension from the commonwealth for any reason other than membership in the association.

(4) Any member who reaches the age of sixty years and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board of retirement upon recommendation of the head of the department in which he is employed, and any member who reaches the age of seventy must so retire.

(5) Any member who has completed a period of thirty-five years of continuous service may retire, or may be retired at any age by the board of retirement upon recommendation of the head of the department in which he is employed, if such action be deemed advisable for the good of the service.

The question, therefore, is whether an employee who is also a veteran, within the meaning of St. 1920, c. 574, § 4, "is or will be entitled to a pension for any reason other than membership in the retirement association," within the meaning of said St. 1911, c. 532, § 3, par. (3).

The pension conferred upon veterans by St. 1920, c. 574, § 4, is non-contributory. But the right to it is not absolute, and does not necessarily become absolute even upon completion of the term of service prescribed. Under sections 2 and 3 the veteran is not retired save upon his own petition or request. Under sections 1, 2 and 3 the approval or consent of the retiring authority is in each case required. Under sections 1 and 2, also, no pension can be paid if the total income of the veteran from all sources, exclusive of such pension, exceeds \$500. One or more of these conditions may never be fulfilled. Thus, while such veteran may become entitled to such non-contributory pension if all conditions are fulfilled, I am of opinion that it cannot presently be said that he "either is or will be entitled" thereto within the meaning of St. 1911, c. 532, § 3, par. (3). It follows that he is not presently rendered ineligible to membership in the Retirement Association established by said St. 1911, c. 532.

In my opinion, St. 1920, c. 574, confers a right of choice upon the veteran. He may, and indeed must, retain his membership in the Retirement Association established by St. 1911, c. 532, until the time for retirement arrives. But when that time comes he must choose between the two systems. He cannot retire under both, even assuming that he can qualify under both. If he chooses to retire and is retired under St. 1911, c. 532, he gives up any right to retire under St. 1920, c. 574. If, however, he elects to retire and is retired under St. 1920, c. 574, he may, in my opinion, claim the refund granted by St. 1911, c. 532, § 6, par. A, cl. (a), which provides as follows:—

Should a member of the association cease to be an employee of the commonwealth for any cause other than death before becoming entitled to a pension, there shall be refunded to him all the money paid in by him under section five, (2) A, with regular interest.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Citizenship — Expatriation — Taking Oath of Allegiance to Foreign State — Entering Military Service of Foreign State — Effect of War upon Right of Expatriation — Summary Method of regaining Lost American Citizenship.

The inherent right of a citizen of the United States to expatriate himself is recognized by the act of July 25, 1868, c. 249, 15 Stat. at L., 223, U. S. Rev. Sts., § 1999.

Under the act of March 2, 1907, § 2, 34 Stat. at L., 1228, U. S. Comp. Stats., 1916, § 3959, an American citizen forfeits his citizenship by taking the oath of allegiance to any foreign State at a time when this country is not at war.

An American citizen who, prior to the entry of the United States into the war, entered the military or naval service of a foreign nation, and as an incident thereof took an oath of allegiance to such nation, forfeited his citizenship.

Quære, whether entry into the military or naval service of a foreign nation, but without taking an oath of allegiance, would forfeit American citizenship.

An American citizen who, after the entry of the United States into the war, entered the military or naval service of a foreign nation, and as an incident thereof took an oath of allegiance to such nation, did not forfeit his American citizenship.

The act of May 9, 1918, c. 69, § 1, cl. 12, 40 Stat. at L., 542, 545, U. S. Comp. Stats., 1916, Supp. 1919, § 4352, cl. 12, provides a summary method of regaining American citizenship lost in the manner above set forth.

JULY 31, 1920.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth.*

DEAR SIR: — You ask my opinion upon the following questions: —

1. Are men who, while citizens of Massachusetts and before the entry of the United States into the war, entered the military or naval service of an allied nation still to be regarded as citizens of this Commonwealth, and as such entitled to vote?

2. Are men who, while citizens of Massachusetts, after the entry of the United States into the war and after having been rejected for military or naval service by the United States because of physical disability, entered the military or naval service of an allied nation still to be regarded as citizens of this Commonwealth, and as such entitled to vote?

3. What steps must be taken by these men in order that they may again be regarded as citizens and entitled to the right to vote?

1. There is authority to the effect that, at common law, a man could not expatriate himself without the consent of his

country and thereby renounce his allegiance to and citizenship in such country. See *Miller v. The Resolution*, 2 Dall. 1; *McIlwaine v. Coxe*, 4 Cranch, 209, 213-214; *Shanks v. Dupont*, 3 Pet. 242, 246-247; *Ainslie v. Martin*, 9 Mass. 454, 461; *Ex Parte Griffin*, 237 Fed. Rep. 445, 449. But the right of expatriation has definitely been established by Federal statute. Act of July 25, 1868, c. 249, 15 Stat. 223, R. S. § 1999; *In re Look Tin Sing*, 21 Fed. Rep. 905; *Mackenzie v. Hare*, 239 U. S. 299. Prior to the passage of the act of March 2, 1907, 34 Stat. 1228, U. S. Comp. Sts. 1916, §§ 3958, 3959, there was conflict as to whether or not expatriation was effected by taking the oath of allegiance to a foreign power. *Van Dyne Naturalization*, p. 338; *Browne v. Dexter*, 66 Cal. 39, 4 Pac. 913 (1884). Prior to the passage of said act the weight of authority seems to have been that merely entering the military or naval service of a foreign State did not of itself work expatriation. *Van Dyne Naturalization*, p. 358; *Calais v. Marshfield*, 30 Me. 511; *State v. Adams*, 45 Ia. 99; see also *The Santissima Trinidad*, 7 Wheat. 283. But it has also been held that one who took the oath of allegiance to a foreign country and thereafter entered its military service thereby lost his citizenship. *Juando v. Taylor*, 2 Paine, 652; Fed. Cas. No. 7558 (1818).

The act of March 2, 1907, § 2, 34 Stat. 1228, U. S. Comp. Sts. 1916, § 3959, provides as follows:—

Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.

This statute expressly provides that taking the oath of allegiance to any foreign State works expatriation. The act is silent, however, as to the effect of entering the military or naval service of another nation. It may be that the au-

thorities which hold that merely entering such service does not effect expatriation remain unshaken. But these authorities do not aid any citizen of this country who takes an oath of allegiance to a foreign State or sovereign as an incident of such enlistment. In *Ex Parte Griffin*, 237 Fed. Rep. 445 (D. C. N. Y. 1916), it was held, under this very act, that an American citizen who in 1916 went to Canada, enlisted in the Canadian Expeditionary Forces, and as an incident of such enlistment took the oath of allegiance to the King of Great Britain, thereby forfeited his American citizenship and might be deported as an undesirable alien when he deserted from such forces a few days later and attempted to return to this country. See also *Browne v. Dexter*, 66 Cal. 39, 4 Pac. 913 (1884); *Juando v. Taylor*, 2 Paine, 652; Fed. Cas. 7558 (1818). I therefore advise you that any citizen of this Commonwealth who prior to the date when this country declared war (April 6, 1917) took the oath of allegiance to any foreign king or State, whether as an incident of enlistment in the military or naval forces of such State or not, thereby expatriated himself, lost his American citizenship, and ceased to be entitled to vote in this State.

2. You further inquire as to the effect of such foreign enlistment subsequent to April 6, 1917, the date when war was declared upon Germany. The act of March 2, 1907, § 2 (*supra*), contains the following proviso: —

And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.

In view of this proviso, I am of opinion that after war was declared American citizens lost the power to expatriate themselves by taking the oath of allegiance to a foreign government. I understand that this is the view taken by the Federal Immigration Bureau. It follows that those American citizens who subsequent to April 6, 1917, enlisted in any foreign army or navy, and as an incident of such enlistment took an oath of allegiance to such foreign king or State, could not and did not thereby terminate their citizenship or lose their right to vote.

3. On Oct. 5, 1917, Congress passed an act (40 Stat. 340) which provided a summary method by which those who had lost their American citizenship by reason of taking the oath

of allegiance to "any foreign state engaged in war with a country with which the United States is at war," in order to enter the military or naval service of such State, might regain their citizenship without complying with the usual requirements for naturalization. This act was expressly repealed by the act of May 9, 1918, c. 69, § 1, cl. 12, 40 Stat. 542, 545, U. S. Comp. Stats. 1916, Supp. 1919, § 4352, cl. 12, which provides as follows:—

Any person who, while a citizen of the United States and during the existing war in Europe, entered the military or naval service of any country at war with a country with which the United States is now at war, who shall be deemed to have lost his citizenship by reason of any oath or obligation taken by him for the purpose of entering such service, may resume his citizenship by taking the oath of allegiance to the United States prescribed by the naturalization law and regulations, and such oath may be taken before any court of the United States or of any State authorized by law to naturalize aliens or before any consul of the United States, and certified copies thereof shall be sent by such court or consul to the Department of State and the Bureau of Naturalization, and the Act (Public fifty-five, Sixty-fifth Congress, approved October fifth, nineteen hundred and seventeen), is here repealed.

The Federal Bureau of Immigration informs me that as a condition precedent to taking the oath of allegiance prescribed by this section the applicant must produce satisfactory proof that at the time of his enlistment in the foreign military or naval service he was an American citizen, either by birth or naturalization, and that he was honorably discharged from such foreign service. If he complies with these requirements and takes the prescribed oath, he immediately resumes his American citizenship. His right to vote then depends upon whether he possesses the qualifications required by our Constitution and laws. Your third question assumes that such person was a duly qualified voter of this Commonwealth at the time of his temporary loss of citizenship. If so, his right to vote immediately revives if he either is registered or registers anew, if that be necessary. *Capen v. Foster*, 12 Pick. 485. His temporary loss of citizenship does not necessarily affect any residence which he may previously have had in this Commonwealth. An alien may be a resident of this State. *Kinneen v. Wells*, 144 Mass. 497. His residence or continued residence must be proved by competent evidence.

But he fulfils the residence requirements of Mass. Const. Amend. III, if at the time he registers (if that be necessary) he has resided in this State for one year, and in the city or town in which he claims the right to vote for six months, even though he has become naturalized within thirty days prior to such registration. *Kinneen v. Wells*, 144 Mass. 497. I therefore advise you that when such temporary alien has complied with the act of May 9, 1918, *supra*, and has thereby recovered his citizenship, his residence is to be determined according to the ordinary rules of law. His temporary loss of citizenship is simply one circumstance to be considered in connection with all the other facts of each particular case.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Constitutional Law — Amendment to Federal Constitution —
When it becomes operative.*

A proposed amendment to the Federal Constitution becomes operative when ratified by three-fourths of the States.

Proclamation of such ratification by the Secretary of State of the United States certifies that ratification has already taken place, and is not itself a condition precedent to the adoption of the amendment.

AUG. 2, 1920.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth*.

DEAR SIR: — You inquire whether the proposed suffrage amendment to the Federal Constitution will, if ratified, become operative upon ratification by the thirty-sixth State or upon official proclamation of such ratification.

U. S. Const., art. V., provides in part as follows: —

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by congress; . . .

Congress did not in this case "propose" that ratification should be by convention in the several States. The proposed amendment will, therefore, "be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states." As there are at present forty-eight States, it follows that the proposed amendment will become a part of the Federal Constitution when duly ratified by the Legislatures of thirty-six States. See *Hawke v. Smith*, 253 U. S. 221; *Rhode Island v. Palmer*, 253 U. S. 350; opinion of the Attorney-General to Hon. Edwin T. McKnight, President of the Senate, Jan. 21, 1920.

When a State ratifies the amendment, that fact is officially certified to the Secretary of State of the United States. When the requisite number of ratifications have been thus certified, the Secretary of State officially proclaims that the amendment has become a part of the Federal Constitution. I find nothing in the Constitution which in any way makes the validity of the amendment depend upon such proclamation. In my opinion, the proclamation simply certifies to a fact which already exists. In this respect it is not unlike the registration of a voter, which officially establishes that he already possesses the constitutional qualifications for the ballot. See *Capen v. Foster*, 12 Pick. 485. It is for you to determine, in the exercise of a sound discretion, what preparations shall be made in advance in order to comply with this amendment, in the event of its adoption. Until the Secretary of State makes official proclamation that the amendment has become a part of the Federal Constitution, your department will have no official knowledge of that fact. In the performance of your official duties you should not assume that it has become a part of the Federal Constitution until the Secretary of State shall so proclaim.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Public Utilities — Railroads — Commutation Tickets — Price of Fares — Regulation and Establishment of Fares — Abandonment of Passenger Stations — Relocation of Passenger Stations and Freight Depots — Regulation of Equipment, Appliances and Service — Repeal of Inconsistent Acts.

The provisions of St. 1908, c. 649, § 2, relative to certain railroad corporations selling commutation tickets at certain prices, are inconsistent with the provisions of St. 1913, c. 784, § 22, which vested in the Board of Railroad Commissioners (now the Department of Public Utilities) complete power to regulate and establish fares on railroads, and to determine the just and reasonable rates, fares and charges to be charged. Being inconsistent, such provisions of St. 1908, c. 649, § 2, were repealed by the provisions of St. 1913, c. 784, § 29. The provisions of St. 1906, c. 463, pt. II, § 137, regulating the abandonment of passenger stations by a railroad corporation, and the following section, § 138, relative to the relocation of passenger stations and freight depots by a railroad corporation, are inconsistent with the provisions of St. 1913, c. 784, § 23, which gave the Board of Railroad Commissioners (now the Department of Public Utilities) unconditional authority to correct equipment, appliances and service which is unjust, unreasonable or inadequate. Being inconsistent, said sections 137 and 138 of part II of chapter 463 of the Acts of 1906 were repealed by St. 1913, c. 784, § 29.

AUGUST 13, 1920.

HON. HENRY C. ATTWILL, *Chairman, Department of Public Utilities.*

DEAR SIR: — On behalf of the Department of Public Utilities you request my opinion upon the following questions of law: —

1. Does St. 1913, c. 784, repeal or modify in any way St. 1908, c. 649, § 2, and, if so, to what extent?

St. 1908, c. 649, § 2, reads as follows: —

Every railroad corporation which has a terminus in Boston, except the Boston, Revere Beach and Lynn Railroad Company, shall sell a commutation ticket good for not more than twelve rides between Boston and each station on its lines within fifteen miles of its terminal station in Boston, at a price not exceeding the average rate for each trip which was charged between said points for the twenty-five-ride commutation tickets in use on the first day of January in the year nineteen hundred and eight, excepting that the minimum fare shall be five cents. The said tickets, before issuance, shall be subject to approval by the board of railroad commissioners both as to the rate of fare and the con-

ditions named therein. So far as is practicable, the rates of fare on all roads for like distances from their terminal stations shall be equal. In any city or town where the said twelve-ride ticket shall exceed in price the price now charged per trip for the twenty-five-ride ticket, then thereafter in the said city or town the said railroad companies shall continue to have for sale a twenty-five-ride ticket at the existing price.

St. 1913, c. 784, § 29, reads, in part, as follows: —

This act shall be deemed and construed as a remedial act and in enlargement and extension of all previous acts and existing laws conferring upon or vesting in the commission any jurisdiction, powers or discretion with respect to any subject or matter treated in this act. Except as above provided all acts and parts of acts inconsistent with any provision of this act, and all acts and parts of acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the commission are hereby repealed: . . .

In your letter you state that —

Tickets issued under the provisions of the act of 1908 were abrogated by the United States Railroad Administration. Obviously, the United States while operating the railroads could charge whatever the Railroad Administration saw fit, but if the 1908 act was not repealed by the Public Service Commission act it would seem that upon the complete return of the railroads to the control of the railroad companies the commutation tickets must be restored at the same rates as were in effect prior to the taking over of the control of the railroads by the United States government.

In answer to your question I direct your attention to the language used by Chief Justice Rugg in the case of *Arlington Board of Survey v. Bay State Street Railway Co.*, 224 Mass. 463, at 469, where he said: —

That act (St. 1913, c. 784) marked a radical change in the policy of the Legislature in the regulation of street railways. It conferred upon the Public Service Commission far greater powers over the operation and accommodations to be provided by such common carriers than had been vested in any board by earlier acts. Summarily stated, it clothed the commission with full power to require safe, reasonable and adequate service to the public from all common carriers. The authority of the commission as to supervision and regulation in other respects is ample. It is manifest that such broad powers justly cannot be exercised to the

extent conferred by the words used except when joined either with equally full power to regulate charges, rates and fares, or with freedom of action by the carrier in these respects, so as to enable the carrier to receive a fair return for the service required. This power expressly is conferred by section 22, which after subjecting the rates and fares actually charged or demanded to their supervision, enacts that whenever the commission is of opinion "that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine the just and reasonable rates, fares and charges to be charged" and shall fix the same by order binding upon the carrier. That these words were intended to be interpreted according to their full natural scope is obvious from the provision of section 29. . . . It is impossible to give the act a narrow or constricted construction as to the subject of fares.

Accordingly, it is my opinion that the provisions of St. 1913, c. 784, give complete powers to the Board of Railroad Commissioners (now the Department of Public Utilities, Gen. St. 1919, c. 350) over the regulation and establishment of fares on railroads, to determine the just and reasonable rates, fares and charges to be charged, and to fix the same by appropriate order, and, in my judgment, the provisions of St. 1908, c. 649, § 2, are inconsistent with this complete power, and, accordingly, under the provisions of section 29 of chapter 784, being inconsistent, were thereby repealed.

2. Do the provisions of St. 1913, c. 784, § 29, repeal the provisions of St. 1906, c. 463, pt. II, §§ 137 and 138?

Sections 137 and 138 read as follows: —

SECTION 137. A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station, unless it is relocated under the provisions of the following section, nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad. The supreme judicial court, upon an information filed by the attorney-general at the relation of ten legal voters of the city or town in which such station is located, shall have jurisdiction in equity to restrain the violation of the provisions of this section.

SECTION 138. A railroad corporation may relocate passenger stations and freight depots, with the approval in writing of the board of railroad commissioners and of the board of aldermen of the city or the selectmen of the town in which such stations or depots are situated.

St. 1913, c. 784, § 23, reads in part as follows: —

Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier, now or hereafter subject to its jurisdiction, are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations and practices, thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby. . . .

Section 137 of part II of said chapter 463 forbids the abandonment of a station which has been maintained for five years, unless the same is relocated. But if such station must be relocated it is in effect merely moved, and not abandoned. Moreover, such relocation cannot be made without the consent of the bodies described in said section 138. Section 137 further forbids absolutely the curtailment of trains which stop at such station as compared with other stations on the same road. In other words, the train service at any station cannot be diminished unless the train service at other stations is curtailed at the same time. Such a provision necessarily restricts the power to rearrange train service in order to meet the reasonable needs created by changed conditions. But section 23 of said chapter 784 vests in the Commission an unconditional authority to correct service which is "unjust, unreasonable or inadequate." Excessive train or station service at any one point is clearly unjust or unreasonable service. It is necessarily an unjust or unreasonable burden upon the road. It may cause either inadequate service elsewhere or else higher rates. The conditions imposed by said sections 137 and 138 of part II of chapter 463 are clearly "inconsistent" with the broad and unconditional authority conferred by section 23 of said chapter 784. In my opinion, section 29 of said chapter expressly repeals said sections 137 and 138.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Fisheries and Game — Nuisance — Destruction of Fish by Chemicals.

Deposits of poison in great ponds, which destroy fish life, may be a public nuisance which the Division of Fisheries and Game has no right to authorize.

AUG. 17, 1920.

WILLIAM C. ADAMS, Esq., *Director, Division of Fisheries and Game, Department of Conservation.*

DEAR SIR: — You have asked whether an ice company has the right to treat a pond with copper sulphate for the purpose of removing algæ from the water, which has resulted in the past in wholesale destruction of fish in the pond.

You further inquire if there is any authority vested in the Department of Conservation to grant a permit to any persons to place chemicals in a great pond where the Board has reason to believe injury to the fish life will result.

The Supreme Judicial Court has said in *Hittinger v. Eames*, 121 Mass. 539, that —

By the law of Massachusetts, great ponds, not appropriated before the Colony Ordinance of 1647 to private persons, are public property, the right of reasonably using and enjoying which, for taking ice for use or sale, as well as for fishing and fowling, boating, skating, and other lawful purposes, is common to all, and in the water or ice of which, or in the land under them, the owners of the shores have no peculiar right, except by grant from the Legislature, or by prescription, which implies a grant.

In the case of *Fay v. Salem & Danvers Aqueduct Co.*, 111 Mass. 27, the court declared not only that great ponds were public property, but that their use for “taking water or ice, as well as for fishing, fowling, bathing, boating or skating, may be regulated or granted by the Legislature at its discretion.” In the case referred to I assume that there has been no act of the Legislature taking away from the public the right of fishing in the pond in question.

The poisoning of waters stocked with fish, thereby killing the fish, was held to be a public nuisance in *People v. Truckee Lumber Co.*, 116 Cal. 397. Whether the use of poison, which results in the killing of a few fish of no particular value, would constitute a nuisance may be a matter of doubt, but it is a question of fact to be determined in every case. The

creating and maintenance of a public nuisance, however, is an indictable offence in this Commonwealth. *Rowe v. Granite Bridge Corp.*, 21 Pick. 344, 346.

It is my opinion that the deliberate deposit of copper sulphate or other poisonous substance in a great pond containing quantities of fish, with knowledge or reasonable expectation of fatal results to the fish therein, may well be a public nuisance and an indictable offence. But, as above indicated, there must be some real injury in order to constitute a nuisance. There is no authority in your Department to authorize the commission of a nuisance anywhere; hence your second question must be answered in the negative.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

*Soldiers' Home in Massachusetts — Money paid out for Work —
Vouchers — Approval by Majority of Trustees.*

Where work has been done at the Soldiers' Home in Massachusetts, it is necessary that a majority of the trustees of said Soldiers' Home shall have personally passed upon and approved the required vouchers before money can be paid out under the appropriation act, St. 1920, c. 629, item 147.

AUG. 23, 1920.

HON. ALONZO B. COOK, *Auditor of the Commonwealth*.

DEAR SIR:— You ask my opinion as to whether money paid out under St. 1920, c. 629, item 147, for work at the Soldiers' Home in Massachusetts, must be on vouchers approved by a majority of the trustees.

It is my opinion that you would not be justified in accepting the approval of persons other than a majority of the trustees, even if such persons might be authorized to act by the trustees. The act specifically confers this duty and power upon the trustees. They cannot delegate such authority. Dillon, *Municipal Corporations*, 5th ed., § 244. Where joint authority is conferred upon public officers, in order to have a valid act a majority must approve. R. L., c. 8, § 4, as amended by Gen. St. 1919, c. 301, § 1. The physical act of approving, of course, may be done by a clerk of the trustees, provided that a majority of the trustees

personally pass upon and approve the voucher. The responsibility is placed upon the trustees and cannot be undertaken by any one else.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Taxation — Interest Rate — Additional Rate by Way of Penalty.

The additional rate of interest of 2 per cent per annum imposed on taxes unpaid after three months from the date on which they become payable applies only to those taxes in excess of \$200 assessed to any taxpayer in any one city or town; but taxes assessed in a fire, water, watch or improvement district, placed for convenience upon the tax bill of a city or town, are not to be considered in computing the \$200 limit.

The additional 2 per cent runs from the date on which the taxes were payable.

Where payments on a tax exceeding \$200 are made so that the balance at the end of the three months is less than \$200, the balance is not subject to the 2 per cent penalty.

AUG. 25, 1920.

HON. WILLIAM D. T. TREFRY, *Commissioner of Corporations and Taxation*.

DEAR SIR: — In accordance with the provisions of St. 1909, c. 490, pt. III, § 5, you have requested my opinion as to certain questions raised by the Massachusetts Tax Collectors' Association, which I will quote and answer. All of these questions relate to the provisions of St. 1920, c. 460. This act reads as follows: —

Taxes shall be payable in every city and town and in every fire, water, watch or improvement district in which the same are assessed, and bills for the same shall be sent out, not later than the fifteenth day of October of each year, unless by ordinance, by-law or vote of the city, town or district, an earlier date of payment is fixed. On all taxes remaining unpaid after the expiration of seventeen days from said October fifteenth, or after such longer time as may be fixed by any city, town or district which fixes an earlier date for payment, but not exceeding thirty days from such earlier date, interest shall be paid at the following rates computed from the date on which the taxes become payable: — At the rate of six per cent per annum on all taxes and, by way of penalty, at the additional rate of two per cent per annum on the amount of all taxes in excess of two hundred dollars assessed to any taxpayer, in any one city or town, if such taxes remain unpaid after the expiration of three months from the date on which they became payable, but if, in any case, the tax bill is sent out later than the day prescribed, interest shall be

computed only from the expiration of such seventeen days or said longer time. In no case shall interest be added to taxes paid prior to the expiration of seventeen days from the date when they are payable, nor shall any city or town so fix an earlier date of payment and longer time within which taxes may be paid without interest as would permit the payment of any taxes without interest after the first day of November in the year in which they are due. Bills for taxes assessed under the provisions of section eighty-five of Part I shall be sent out not later than December twenty-sixth, and such taxes shall be payable not later than December thirty-first. If they remain unpaid after that date, interest shall be paid at the rates above specified, computed from December thirty-first until the day of payment, but if, in any case, the tax bill is sent out later than December twenty-sixth, the said taxes shall be payable not later than ten days from the date of the bill, and interest shall be computed from the fifteenth day following the date when the tax becomes due. In all cases where interest is payable it shall be added to and become a part of the tax.

1. On what class of taxes is the additional 2 per cent rate of interest to be applied?

The provisions of chapter 460 on this point are that interest shall be paid at the following rates computed from the date on which the taxes become payable: —

At the rate of six per cent per annum on all taxes and, by way of penalty, at the additional rate of two per cent per annum on the amount of all taxes in excess of two hundred dollars assessed to any taxpayer, in any one city or town, . . .

Penal statutory provisions of this character are to be construed strictly, and not extended by implication to any taxes not clearly within their provisions. It is clear, from the language of the statute, that the additional rate of 2 per cent per annum, by way of penalty, applies only to those taxes in excess of \$200 assessed to any taxpayer in any one city or town. It does not, in my opinion, apply to taxes assessed in a fire, water, watch or improvement district. It follows, therefore, that if such taxes are for convenience placed upon the tax bill of a city or town they are not to be considered in computing the \$200 limit.

2. Does the additional 2 per cent run from the date on which the taxes were payable, or only from the expiration of the three months mentioned in the act?

From an examination of the wording of the above provision it appears that the 2 per cent rate of interest is a penalty which attaches to taxes in excess of \$200 which are not paid within three months from the due date, and that such penalty is to be figured back to such due date. The collection of taxes is so essential to the support of government that the Legislature may pass very strict laws in regard to their collection. No man has a right to postpone the payment of his taxes and, prior to the passage of St. 1920, c. 460, the penalty was a uniform 6 per cent. The apparent object of the 1920 act is to secure the payment of the great bulk of the taxes within a reasonable time after they are due. It is my opinion that the Legislature has aptly provided that the 2 per cent penalty shall attach as of the due date of the tax, provided that the tax exceeds \$200 and remains unpaid for three months.

3. A person assessed for taxes in one municipality for over \$200 makes payments under the provisions of St. 1909, c. 490, pt. II, § 19, as amended by Gen. St. 1916, c. 20, so that at the expiration of three months less than \$200 remains unpaid. Is this amount subject to the 2 per cent penalty?

In my opinion, it is not. The penalty attaches to all taxes in excess of \$200 assessed to any taxpayer which remain unpaid after the expiration of three months from the due date. As there is no amount in excess of \$200 unpaid at the expiration of three months, I do not see how the amount less than \$200 can be held subject to the penalty provision. The act treats all alike on taxes up to \$200, but to say that because a man originally had a \$300 tax, on which \$100 had been paid, he should pay a penalty, while a man with an original \$200 tax, on which nothing had been paid, should pay no penalty for more than three months' delay in payment, would be a discrimination which I believe the Legislature cannot be presumed to have intended.

This answer applies with equal force to the case where a taxpayer was assessed a tax exceeding \$200 on several parcels of real estate and had paid off on certain parcels so that the tax remaining unpaid was less than \$200.

4. Does interest on taxes of 1919 and prior years remaining unpaid at the date when chapter 460 goes into effect come within these provisions?

The act was approved May 14, 1920, and takes effect ninety days after its passage, as it contains no emergency preamble. The act merely substitutes a new section 71 for the original section 71 in part I of chapter 490 of the Acts of 1909. The title is, "An Act relative to interest on unpaid taxes," which indicates an intention that it is an act of general applicability. Any taxpayer owing taxes assessed prior to the passage of the act has ninety days from May 14, 1920, in which to pay his taxes with 6 per cent interest. Taxes which have been assessed and remain unpaid in an amount exceeding \$200 at the date when the act goes into effect bear interest at the rate of 6 per cent to the date when the act goes into effect, and at the increased rate of 8 per cent thereafter.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Signatures — Use of Rubber Stamp Facsimile.

Judges of probate have authority to use a rubber stamp facsimile of signature on commitment papers of insane persons.

AUG. 28, 1920.

GEORGE M. KLINE, M.D., *Commissioner of Mental Diseases*.

DEAR SIR: — You ask if a judge of probate can lawfully use a rubber stamp facsimile of his signature on commitment papers of insane persons.

In an opinion rendered to the Secretary of the Commonwealth on July 21, 1903, by Hon. Herbert Parker, then Attorney-General, it was held that the Secretary of the Commonwealth might affix his signature to licenses by means of a stamp. The word "signature" is defined in Sweet's Law Dictionary as follows: —

In the primary sense of the word, a person signs a document when he writes or marks something on it in token of his intention to be bound by its contents. In the case of an ordinary person, "signature" is commonly performed by subscribing his name to the document, and hence "signature" is frequently used as equivalent to "subscription;" but any mark is sufficient if it shows an intention to be bound by the document.

In the case of *In re Covington Lumber Company*, 225 Fed. Rep., 444, the court said: —

Signatures adopted by persons are sufficient to give validity to instruments, and it is immaterial whether the signature be printed or not, if it is adopted and recognized as the signature of the party. 36 Cyc. 448.

In the case of orders of commitment, about which you inquire, the statute makes the incumbent of the office of judge of probate the magistrate empowered with the authority to sign commitment papers, and I am of the opinion that in such capacity the signature made by the use of a rubber stamp is a lawful signature, and that it is the duty of the State hospital authorities to honor orders of commitment so signed, unless they have reason to believe that the signature has not been affixed by the magistrate.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Public Charitable Institution — Boston Consumptives' Hospital.

The words "public charitable institution," as used in St. 1920, c. 306, should be confined to charitable institutions supported by the State, county or municipality to which persons are committed.

AUG. 30, 1920.

DR. EUGENE R. KELLEY, *Commissioner of Public Health*.

DEAR SIR:— You have asked my opinion as to whether the words "public charitable institution," as used in St. 1920, c. 306, include the Boston Consumptives' Hospital.

St. 1920, c. 306, amends R. L., c. 75, § 48, in certain particulars not pertinent to your inquiry. Section 48, as amended, reads, in part, as follows: —

An inmate of a public charitable institution or a prisoner in a penal institution who is afflicted with syphilis, gonorrhœa or pulmonary tuberculosis shall forthwith be placed under medical treatment, . . . If, at the expiration of his sentence, he is afflicted with syphilis, . . . or if, in the opinion of the attending physician of the institution . . . his discharge would be dangerous to public health, . . . he shall be . . . cared for . . . in the institution where he has been confined. . . . The expense of his support . . . shall be paid by the place in which he has a settlement. . . .

R. L., c. 75, § 48, is based on St. 1891, c. 420. Section 1 of that act reads, in part, —

Any person who is confined in, or an inmate of, any state penal or charitable institution, a common jail, house of correction or municipal or town almshouse. . . .

The definition of "public charitable institution" must be derived from the context of the statute. The words have no fixed meaning. Taken alone one might give to them a far broader definition than would be warranted by the language of the statute in which they were used. Of the word "institution" alone one will find almost as many definitions as there are cases, and it has been held that the term "institution" implies a foundation by law, and that a private school or college may not be called an institution because one cannot properly be said to "institute it." *Dodge v. Williams*, 46 Wis. 70. In New York a statute conferring on the State Board of Charities the right of visitation and inspection of all charitable institutions was held by the court to be limited to those charitable institutions which received public money raised by taxation for the support and maintenance of indigent persons. *People v. New York Society for the Prevention of Cruelty to Children*, 162 N. Y. 429.

In St. 1920, c. 306, the expressions "at the expiration of his sentence," "in the institution where he has been confined" and "inmate" indicate that the act is limited to prisons and other institutions where a person is subject to a greater or less legal restraint in his personal liberty, and St. 1891, c. 420, except for prisons, refers only to State charitable institutions and municipal and town almshouses. The wording of this statute and its later amendments all indicate that the words "public charitable institution" should be confined to charitable institutions supported by the State, county or municipality to which persons are committed and are usually known as "inmates."

Unless persons in the Boston Consumptives' Hospital are subject to a certain legal restraint and are there as paupers, State charges or by court commitment, St. 1920, c. 306, does not give the hospital either the right or the duty to apply the provisions of the act to patients therein.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Taxation — Exemption — Property of Commonwealth — Betterments.

Land owned by the Commonwealth is not subject to assessment by a city for benefits.

SEPT. 4, 1920.

MR. ROBERT W. KELSO, *Commissioner of Public Welfare.*

DEAR SIR: — The city of Lowell has assessed the Commonwealth for betterments in the form of sidewalks abutting on land owned by the Commonwealth and held through the Homestead Commission under authority of Gen. St. 1917, c. 310. You have asked my opinion as to whether you should authorize the payment of these bills.

R. L., c. 12, § 5, par. 2d, reads: —

The following property and polls shall be exempted from taxation: —

.

Second. The property of the commonwealth, except real estate of which the commonwealth is in possession under a mortgage for condition broken.

It is clear from the language of the statute that the Commonwealth is not liable for real property taxes assessed by a city (*Corcoran v. Boston*, 185 Mass. 325), but there is no case deciding the point as to betterments.

In *Worcester County v. Worcester*, 116 Mass. 193, the court held that the court house and jail, the property of Worcester County, were not liable for a sewer assessment levied by the city of Worcester. Devens, J., at page 194, argues: —

As every tax would to a certain extent diminish its capacity and ability, we should be unwilling to hold that such property was subject to taxation in any form, unless it were made so by express enactment or by clear implication. This property of the petitioners is not, indeed, in legal form, the property of the Commonwealth, but the authority by which the county holds it is derived from the statutes by which the duty is imposed upon the various counties of providing suitable courthouses, jails and houses of correction.

The court house and jail were property appropriated to a public use, but it would seem that land purchased by the Commonwealth through the Homestead Commission, under

authority of the Legislature, was also appropriated to a public use, in view of Mass. Const. Amend. XLIII.

The reasoning, therefore, of Devens, J., would apply with greater force to the present case, where the land is owned directly by the Commonwealth and not by a county. As the only remedy given for collection of the assessment is by sale of the property, the courts have hesitated to subject estates of the Commonwealth or its political subdivisions to liens for taxes unless the intent of the Legislature to do so is clear. *Worcester County v. Worcester*, 116 Mass. 193; *Burr v. Boston*, 208 Mass. 537; I Op. Atty.-Gen. 606.

It is therefore my opinion that you should not authorize payment of the tax bills.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Support of an Inmate of a County Training School.

When a boy has been committed to a training school under an order of court directing that the parents pay the cost of his support while in said school, the provision of St. 1920, c. 40, which requires a city or town from which a boy is committed to pay \$2 per week toward his support, does not apply.

SEPT. 7, 1920.

MR. THEODORE N. WADDELL, *Director of Accounts, Department of Corporations and Taxation.*

DEAR SIR: — You state that St. 1920, c. 40, provides that a city or town shall pay \$2 per week for the support of a boy committed from such city or town to a county training school. You then draw my attention to a case where a boy has been committed to such a school under an order of the court, entered pursuant to St. 1913, c. 779, § 9, directing that the boy's parents pay the cost of his support while in said school; and you request my opinion whether the said provision of chapter 40 applies in this case.

Chapter 40, amending the last paragraph of section 1 of chapter 46 of the Revised Laws, as amended, provides: —

The city or town from which an habitual truant, absentee or school offender is committed to a county training school shall pay to the county or counties maintaining the same two dollars a week toward his support, and reports of the condition and progress of its pupils in said school shall

be sent each month to the superintendent of schools of such city or town; but the town of Winthrop and the cities of Revere and Chelsea shall pay to the county of Middlesex, for the support of each child committed to the training school of said county, two dollars and fifty cents a week, and such additional sums for each child as will cover the actual cost of maintenance.

St. 1913, c. 779, § 9, amending R. L., c. 46, § 6, provides: —

The court or magistrate by whom a child has been committed to a county training school may make an order relative to the payment by his parents to the county of the cost of his support while in said school, and may from time to time revise and alter such order or make a new order as the circumstances of the parents may justify.

Chapter 40, like other statutory provisions, must be construed so as to effectuate the intent of the Legislature. The chapter does not merely impose a charge of \$2 a week for each boy committed, but it provides that the money shall be paid "toward his support." If the boy is already being supported by his parents, pursuant to an order of court, it is difficult to see how the city of his residence could or should pay \$2 per week more "toward his support." I am of opinion that the Legislature intended a city to pay \$2 per week toward the support of a boy being maintained by the county, but not toward the support of a boy being maintained by his parents.

I am confirmed in this view by the last clause of chapter 40, which provides that Winthrop, Revere and Chelsea shall pay to the county of Middlesex, for each child committed to the training school, \$2.50 per week, "and such additional sums for each child as will cover the actual cost of maintenance." This clause is a further indication that the charge is imposed to provide support not otherwise provided for, and for no other purpose.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Sealers of Weights and Measures — Authority to seal Computing-Measuring Device — Arithmetical Correctness of Price computed to the Nearest Cent.

Under St. 1907, c. 535, § 1, as amended by Gen. St. 1917, c. 8, § 1, a sealer of weights and measures may lawfully seal for use in this Commonwealth a device designed to measure fabrics in eighths of yards, and to indicate the price of the fabric so measured, if he finds that said device indicates the linear measure correctly, and correctly computes the corresponding price to the nearest cent.

The computation of price may be found to be arithmetically correct, even though the odd fraction of a cent is not indicated, if that odd fraction of a cent is apportioned to dealer or customer in accordance with the arithmetical test prescribed by commercial custom.

SEPT. 9, 1920.

E. LEROY SWEETSER, Esq., *Commissioner of Labor and Industries.*

DEAR SIR: — You inquire whether, under St. 1907, c. 535, § 1, as amended by Gen. St. 1917, c. 8, § 1, and construed in *Moneyweight Scale Co. v. McBride*, 199 Mass. 503, a sealer of weights and measures may lawfully seal a computing-measuring device of the description hereinafter set forth, assuming that all indications of linear measurement are accurate, and that corresponding prices are correctly indicated to the nearest cent. The device is described in your letter as follows: —

An instrument designed to be used for the determination of linear measure of textile fabrics in yards and eighth yards only, including a chart to be used in establishing a money value or sales price for any number of yards or eighth yards up to twelve yards, this being the maximum capacity of the device. In operation the quantity of fabric measured is indicated upon a dial, while the money value of the quantity measured is shown by figures upon a chart which revolves in conjunction with the measuring mechanism. There are no figures, graduation lines, or other indicating marks upon the dial which would permit measurements other than yards and eighths of yards to be made. Computations of value appear upon chart at intervals of eighth yards only, all fractions of one-half cent or over being figured as one cent.

St. 1907, c. 535, § 1, as amended by Gen. St. 1917, c. 8, § 1, provides: —

The provisions of chapter sixty-two of the Revised Laws relating to the adjusting, testing and sealing of weights, measures and balances

shall apply to all scales, balances, computing scales and other devices having a device for indicating or registering the price as well as the weight or measure of the commodity offered for sale. All such computing devices shall be tested as to the correctness of both weights or measures and values indicated by them.

Moneyweight Scale Co. v. McBride, supra, decided, first, that under St. 1907, c. 535, the duty and authority to determine whether or not a computing scale was correct as to weights and corresponding values was vested in the several sealers of weights and measures; second, that St. 1907, c. 535, was constitutional in that the accuracy of computing scales as to weight was to be determined by the standard weights prescribed by law, and the accuracy of such computing scales as to corresponding values was to be tested by arithmetic. In this connection the court said, at p. 515:—

For these reasons we are of opinion that the General Court when it enacted St. 1907, c. 535, by which the correctness of self-computing scales and the other devices therein mentioned was committed to the final decision of the sealers of weights and measures for the several cities and towns of the Commonwealth, must (in our opinion) have intended that the values to be placed on such charts should be arithmetically correct. So construed, St. 1907, c. 535, is a valid statute, and the decree dismissing the bill must be affirmed.

The computing-measuring device in question here is designed to measure fabrics in yards and eighths of yards, and at a given price per yard to indicate to the nearest cent the corresponding value of the goods so measured. The smallest fraction of a yard which can be measured is one-eighth of a yard, and the corresponding values are indicated to the nearest cent for eighths of yards only. It is not designed to perform the converse operation, namely, to determine how much fabric the seller shall deliver, at a given price per yard, for a designated sum in money. Indeed, I am informed that fabrics are seldom if ever sold in this manner. For both reasons the difficult questions incident to determining the "commercial" accuracy of a device designed to indicate how much cloth the merchant should deliver, at a given price per yard, in exchange for a fixed sum are entirely eliminated. The sole question is whether a device which measures the length of the fabric in eighths of yards and indicates the

corresponding values to the nearest cent may lawfully be tested, and, if found to be accurate, may be sealed under authority of St. 1907, c. 535, § 1, as amended by Gen. St. 1917, c. 8, § 1.

Our smallest coin is one cent. If the price of goods sold includes a fraction of a cent, the settled commercial custom is to pay to the nearest cent. If the fraction be less than a half cent it is disregarded. If the fraction equal or exceed one-half cent it is treated as a cent, and the customer pays accordingly. This custom is recognized in the *Moneyweight Scale* case. It obtains, whether the price be computed with pencil and paper or by a mechanical device. Since the purpose of computation either with pencil and paper or mechanically is to determine the number of cents which the customer should pay, the device is, in my opinion, arithmetically accurate, within the meaning of the *Moneyweight Scale* case, if the price be determined correctly in accordance with the commercial custom above described. It is true that the statute confers no discretion upon the sealer. He must test the device according to the rules of arithmetic. Those rules determine the number of even cents in the price to be paid. The custom, which has the force of law, determines by a strictly arithmetical test what disposition shall be made of the additional fraction of a cent. The test to be applied does not cease to be a purely arithmetical one or involve any exercise of discretion because the arithmetical rule imposed by the custom is applied in order to determine the proper disposition of the fraction of a cent involved. I therefore advise you that if the computing-measuring device correctly measures the length of the fabric in accordance with the standards prescribed by law, and correctly computes the price for each eighth of a yard which is measured, in accordance with the commercial custom above described, such computing-measuring device may lawfully be sealed for use in this Commonwealth.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

*Savings Banks — Power to establish Safe Deposit Department —
Power to make a Business of receiving Securities for
Safekeeping.*

A savings bank is not authorized to establish a safe deposit department.

A savings bank is not authorized to make a business of receiving securities for safekeeping except to the extent and under the conditions prescribed by Gen. St. 1919, c. 60.

SEPT. 10, 1920.

MR. JOSEPH C. ALLEN, *Commissioner of Banks.*

DEAR SIR: — You have asked my opinion as to the right of savings banks to establish safe deposit departments. The formation and conduct of savings banks are primarily regulated by St. 1908, c. 590, with numerous amendments thereof and additions thereto. This act contains over seventy sections and goes into great detail in regard to incorporation, management, deposits and investments. I find no provision of law which expressly or impliedly authorizes a savings bank to establish a safe deposit department, although section 69, subsection 9, expressly regulates the purchase of a suitable site and the erection of a suitable building for the convenient transaction of its business. This omission is very significant in view of the fact that R. L., c. 116, which regulates trust companies, expressly authorizes by section 12 the receipt on deposit and storage of stocks, bonds, jewelry and valuable papers, and by section 38 defines in detail the procedure for collecting the unpaid rent of safe deposit boxes. The effect of this omission is emphasized by Gen. St. 1919, c. 60, which provides as follows: —

Savings banks and institutions for savings may, with the written permission of and under regulations approved by, the bank commissioner, receive and hold for their depositors any securities issued by the United States.

If savings banks had implied or incidental power to establish a safe deposit department, or even to make a business of receiving securities for safekeeping, Gen. St. 1919, c. 60, would have been wholly superfluous. I am therefore constrained to advise you that in my opinion savings banks are not authorized to establish a safe deposit department, or even to make a business of receiving securities for safekeeping, except, of course, to the extent permitted by Gen. St. 1919, c. 60.

You do not ask, and I do not decide, whether, under exceptional circumstances, as a matter of accommodation, a savings bank might receive securities for temporary safekeeping until they could be placed in safety elsewhere.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Chiropody — Registration — Failure to register before Date set by Statute — Requirements for Registration and Issuance of Certificate.

Under Gen. St. 1917, c. 202, § 5, as amended by Gen. St. 1918, c. 15, a person who had been engaged in the practice of chiropody in this Commonwealth for a period of more than two years prior to the passage of Gen. St. 1917, c. 202, and who failed to make application for registration on or before May 1, 1918, is obliged to comply with the provisions of Gen. St. 1917, c. 202, § 5, par. (3), before being registered and receiving a certificate as a chiropodist.

SEPT. 15, 1920.

Dr. WALTER P. BOWERS, *Secretary, Division of Chiropody, Department of Registration in Medicine.*

DEAR SIR: — You request my opinion on the following: —

Paragraphs (1), (2) and (3) of section 5 of chapter 202 of the General Acts of 1917, as amended by chapter 15 of the General Acts of 1918, read as follows: —

Registration under this act shall be granted as follows: — (1) Any chiropodist who shall furnish the board with satisfactory proof that he is twenty-one years of age or over, and of good moral character, who shall make application for registration on or before the first day of May, nineteen hundred and eighteen, and who proves to the satisfaction of the said board that he has been engaged in the practice of chiropody in this commonwealth for a period of two years or more next prior to the passage of this act, shall, upon the payment of a fee of ten dollars, be registered without examination, and shall receive a certificate as a chiropodist registered under this clause, signed by the chairman and secretary of the board.

(2) Any person who is engaged in the practice of chiropody in this commonwealth at the date of the passage of this act, but who has so been engaged for a period of less than two years next prior to the said date shall, upon furnishing the board with satisfactory proof that he is twenty-one years of age or over, and of good moral character, and upon the payment of a fee of fifteen dollars, be examined as provided in sections three and eight of this act, and if found qualified, shall be regis-

tered, and shall receive a certificate as a chiropodist registered under this clause, signed by the chairman and secretary.

(3) Any person not entitled to registration as aforesaid, who shall furnish the board with satisfactory proof that he is twenty-one years of age or over, and of good moral character, and that he has received a diploma or certificate from a reputable school of chiropody, or from some other institution of equal standing, having a minimum requirement of one year's course of at least eight months shall, upon payment of a fee of fifteen dollars, be examined as provided in sections three and eight of this act, and if found qualified, shall be registered, and shall receive a certificate as a chiropodist registered under this clause, signed by the chairman and secretary.

At the time of the passage of this act, on April 24, 1917, a woman residing in Lowell had been practicing chiropody in this Commonwealth for a considerable number of years, but had neglected to make application for registration until she was complained of for violating the law, and she now desires to be examined under paragraph (2) rather than under paragraph (3), which requires that an applicant for registration shall have received a diploma or certificate from a reputable school of chiropody or from some other institution of equal standing having a minimum requirement of one year's course of at least eight months.

The Legislature, by the provisions of paragraphs (1) and (2), made provision for those persons engaged in the practice of chiropody at the date of the passage of the act. They were divided into two groups, those who had been engaged in practice for a period of two years or more next prior to the passage of the act, and those who had been engaged for a period of less than two years. Those falling in the first group, who made application before the first day of May, 1918, were entitled to be registered without examination upon the payment of a fee of \$10, and note here that the act placed the date on or before which applicants in this class should register as on or before Oct. 1, 1917. This date was later extended by Gen. St. 1918, c. 15, to May 1, 1918, and for those persons absent from the Commonwealth by reason of military or naval service, by Gen. St. 1919, c. 316, to Oct. 1, 1919.

Those persons who were engaged in practice for less than two years at the date next prior to the passage of the act were entitled to be examined upon the payment of a fee of \$15, and, if found qualified, to be registered.

The person in question came within the first group, as she had been engaged in practice for more than two years next prior to the passage of the act, and, under the provisions of paragraph (1), she should have made application on or before the first day of May, 1918, to receive the privileges of that paragraph. The provisions of paragraph (2) in no way apply to her. Not having availed herself of the privileges of paragraph (1), she must now comply with the provisions of paragraph (3).

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Credit Unions — Membership — Corporations — Loans.

A corporation cannot be a member of a credit union organized under the provisions of Gen. St. 1915, c. 268.

A credit union must confine its membership to individuals, and, as it must limit its loans to its own members, it cannot loan money to a corporation.

SEPT. 18, 1920.

Hon. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR:— You request my opinion on the question as to whether or not a Massachusetts corporation may be a member of a credit union established under the provisions of Gen. St. 1915, c. 268, and if such a corporation, as a member, could legally borrow money from such a credit union.

In the by-laws of a certain credit union, a business corporation is set forth as a member of the credit union. Being set forth as a member, the company has been borrowing money from the credit union, the practice having been to lend the surplus funds to the company on demand notes at current rates. The clerk of the credit union reports that the company now holds \$1,900 of the outstanding loans of the credit union which amount in all to \$2,811. Another loan to the company is being considered, and the clerk desires to know if there is any advisable limit to the percentage of the funds of the union which may be loaned to the company.

The law of this Commonwealth relative to credit unions provides that the capital, deposits and surplus funds may be invested in loans to members where approved by the credit committee, and any excess over approved loans shall be deposited or invested only in accordance with certain regulations

set forth in the act. (Gen. St. 1915, c. 268, § 11.) Under no circumstances may loans be made to persons who are not members of the union.

An examination of the history and purpose of credit unions and the provisions of the present law of the Commonwealth relative thereto clearly indicates that it was not intended that corporations should be included in the membership. The fundamental principles of credit unionism contemplate the association of individuals for the purpose of promoting thrift among members.

The pamphlet which you have furnished me, in which your Department outlines the growth of the credit union, quite plainly points to this proposition. For instance: —

The association shall be one of men and not of shares.

As loans are made only to members, and as any member may become a borrower, care must be taken to admit to membership only men and women of honesty and industry.

Personal knowledge of the character of the members is essential.

In making loans it should be recognized that character and industry are the basis of credit.

Members must be scrutinized as to character before they are admitted.

The credit committee must examine into the habits of the borrower in order to ascertain his ability and willingness to repay the loan. Unless the moral security is good, the loan should be refused in order that the necessity for honest, industrious and respectable living should be brought home to the members.

Turning to the provisions of chapter 268, further evidence may be adduced to establish the intent that membership shall be limited to individuals.

Section 6 provides, in part, that the by-laws —

shall prescribe . . . the conditions of residence or occupation which qualify persons for membership.

Section 24 provides, in part, that the board of directors may expel any member —

who has been convicted of a criminal offence . . . or whose private life is a source of scandal, or who habitually neglects to pay his debts, or who shall become insolvent or bankrupt, or who shall have deceived the corporation or any committee thereof with regard to the use of borrowed money.

It is further to be observed that membership in the board of directors of the credit committee and the supervisory committee is restricted to members of the credit union.

If a director or a member of any of these committees ceases to be a member of the credit union, his office should thereupon become vacant. (See section 14.)

No provision is made for a representation either upon the board of directors or upon the committees by corporations.

It is further provided that —

Unless the number of members of a credit union is less than eleven, no member of said board shall be a member of either of said committees . . .

If corporations were eligible to membership, a credit union of eleven members, a majority of which were corporations, could not effect its organization.

Upon the foregoing considerations, I am of the opinion that a corporation may not be a member of a credit union organized under the provisions of Gen. St. 1915, c. 268.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Election Law — Political Designation by Independent Candidates.

A candidate whose name appears on an official ballot through nomination papers cannot attach the name of a political party thereto unless he receives a nomination by such party.

SEPT. 25, 1920.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth*.

DEAR SIR:— The following inquiries relative to election laws have been received from your Department:—

Gen. St. 1917, c. 250, § 1, amending St. 1913, c. 835, § 201, provides that “if a candidate is nominated otherwise than by a political party, the name of a political party shall not be used in his political designation. . . .”

1. Under this provision of law, can a regular republican candidate, having been nominated by a political party, use the designation “democratic independent” on nomination papers as a candidate for the same office?

2. Can a woman sign nomination papers for candidates for public office?

St. 1913, c. 835, § 198, provides: —

Nominations of candidates for any offices to be filled by all the voters of the commonwealth may be made by nomination papers, stating the facts required by section two hundred and one and signed in the aggregate by not less than one thousand voters for each candidate. Nominations of all other candidates for offices to be filled at a state election, and of all candidates for offices to be filled at a city election, except in Boston, and in other cities where city charters provide otherwise, may be made by like nomination papers, signed in the aggregate, for each candidate, by two voters for every one hundred votes cast for governor at the preceding annual state election in the electoral district or division for which the officers are to be elected, but in no case by less than fifty nor more than one thousand qualified voters. In Boston the nomination of candidates for any municipal elective office to be voted for at the municipal election in said city shall be made by nomination papers, prepared and issued by the election commissioners, signed in person by at least five thousand registered voters in said city qualified to vote for such candidates at said election. Nominations of candidates for offices to be filled at a town election may be made by nomination papers, signed by at least one voter for every fifty votes polled for governor at the preceding annual state election in such town, but in no case by less than twenty voters. . . .

1. The statute above quoted was enacted to prevent independent candidates for public office from securing undue advantages over candidates nominated by parties in the regular manner. The intention of the law is clear, that no person shall be entitled to use a political party designation after his name unless he receives a nomination by such political party. Thus, an independent candidate is not entitled to attach the name “republican” or “democrat” to his political designation. The fact that a candidate has received a party nomination cannot entitle him to use the political designation of another party when filing independent nomination papers.

2. The law provides that nomination papers shall be signed by qualified voters. The Nineteenth Amendment to the Federal Constitution provides that the right of citizens of the United States to vote shall not be denied or abridged on account of sex. St. 1920, c. 579, which took effect upon the ratification of the Nineteenth Amendment, has extended to women who possess the requisite qualifications the right to vote. I am of opinion that the right to vote includes as an incident a right to participate in the nomination of candidates,

and therefore to sign nomination papers. I therefore advise you that a woman who has been duly registered as a voter may sign such papers.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Trust Company — Savings Department — Extra Dividend — Payment.

A savings department of a trust company cannot pay an extra dividend other than under and in accordance with St. 1908, c. 590, § 63.

The provisions of St. 1908, c. 590, § 63, do apply where an extra dividend was declared prior to the date that St. 1920, c. 563, became operative, and which was payable subsequent to that date.

SEPT. 28, 1920.

HON. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR: — You ask my opinion on the following questions: —

1. May the savings department of a trust company pay an extra dividend other than as provided by St. 1908, c. 590, § 63?

2. Would said section 63 affect an extra dividend declared prior to the date that St. 1920, c. 563, became operative, and which was payable subsequent to that date?

St. 1920, c. 563, § 6, provides, in regard to savings departments of trust companies, in part as follows: —

Ordinary dividends in such a department shall not exceed the rate of five per cent a year, and extra dividends may be paid as by savings banks, under and in accordance with section sixty-three of chapter five hundred and ninety of the acts of nineteen hundred and eight.

It is evident from this provision of St. 1920, c. 563, that the answer to question 1 is in the negative.

Prior to the enactment of St. 1920, c. 563, no express provision had been made by statute for payment of dividends by the savings department of a trust company. The authority to pay interest or dividends upon savings deposits must be found in the general provisions relating to the payment of dividends by trust companies, or implied from St. 1908, c. 520, § 5, which provides: —

All income received from the investment of funds in said savings department, after deducting the expenses and losses incurred in the

management thereof and such sums as may be paid to depositors therein as interest or dividends, shall accrue as profits to such corporation and may be transferred to its general funds.

By St. 1920, c. 563, § 6, the distinction is made between ordinary and extra dividends. Prohibition is put upon payment of ordinary dividends in excess of 5 per cent, and a provision is made that extra dividends may be paid under the same provisions governing payment of extra dividends by savings banks. The payment of extra dividends is not made compulsory, as in the case of savings banks, under the provisions of St. 1908, c. 590, § 63, but it is the clear intent of the statute that no extra dividend shall be paid by the savings departments of trust companies other than under the same conditions which obtain in the case of savings banks.

The answer to your second question is to be found in the language of the statute, which determines when and under what conditions extra dividends "may be *paid*," and it follows that any dividend paid subsequent to the time that St. 1920, c. 563, became operative could be paid only under the authority of that act. Dividends declared are not dividends paid, and if a dividend is paid contrary to the statutory limitations governing payment, it can make no difference when the dividend was declared. It follows that the answer to your second question must be in the affirmative.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Optometry, Practice of — Assistance in Use of Eyeglass Tester.

Where one possesses an appliance and lends manual assistance in the operation of the same, which requires no technical knowledge of the science of optometry, said assistance being rendered to a customer in the use of the appliance by turning a disc to enable the customer to look through a series of lenses, it cannot be said that the lending of such assistance constitutes the practice of optometry, within the meaning of St. 1912, c. 700, § 1.

The use of such an appliance, and its operation as indicated, by a seller does not come within the prohibition of St. 1912, c. 700, if neither advice nor instruction is given the customer.

OCT. 1, 1920.

Division of Optometry, Department of Civil Service and Registration.

GENTLEMEN: — You state certain facts relating to the use of an appliance called the auto eye tester, and request my opinion upon the following question of law: —

Does the fact that the possessor of this appliance provides a "method or means" of making an examination of the eyes mean that the seller is thereby practicing optometry?

It appears from the papers accompanying your letter that a complaint was received by the Division of Optometry to the effect that a firm dealing in spectacles or eyeglasses was using an appliance called the auto eye tester, and was advertising that by the use of the appliance persons could fit their eyes to glasses. Investigation by the State Police, at the instance of your Division, confirmed the statements contained in the complaint, and also disclosed the fact that clerks employed by this firm assisted customers in the use of the appliance by turning a disc to enable the customer to look successively through a series of lenses.

It is the contention of the manufacturer that the use of this appliance by customers to assist them in determining what eyeglasses are suited to their eyes does not constitute a violation of law, in that its use by the customer is not, in any legal aspect, different from the use by the customer of numerous pairs of eyeglasses in trying the lenses to make a selection.

The company claims that it merely facilitates the selection of eyeglasses best suited to the customer.

St. 1912, c. 700, § 1, reads as follows:—

The practice of optometry is defined to be the employment of any method or means other than the use of drugs for the measurement of the powers of vision and the adaptation of lenses for the aid thereof.

It is further provided in section 5 of said chapter that no person shall practice optometry until he shall have passed an examination and shall have received a certificate of registration. Certain persons are exempted from the provisions of the act under section 10, including "persons who neither practice nor profess to practice optometry, but who sell spectacles or eyeglasses or lenses, either on prescription . . . or as merchandise from permanently located and established places of business." No question is raised upon the record that the seller has a permanently located and established place of business, and that the persons who sell the spectacles or eyeglasses do not profess to practice optometry.

The question submitted to me, therefore, turns upon what is meant by "practicing optometry." Obviously there is no

restraint imposed by the statute upon a customer trying on any number of pairs of glasses for the purpose of testing which one most assists the vision. No objection could be made to the use by the customer of a series of trial glasses, with different lenses and numbers, furnished by the seller to enable the customer to test his vision. There is no valid distinction between the use by the customer of a series of eyeglasses in testing the vision, and the use of an appliance containing a series of lenses which enables the customer to make a selection with greater facility.

Nor does it make any difference that the seller assists the customer in the use of the appliance by turning a disc to present the lenses in succession. If this were true, a child could practice optometry, and it would cease to be a skilled profession.

It is not necessary to attempt to lay down an exact rule to determine in all cases what is or is not included in the practice of optometry. It is sufficient in the present case to say that manual assistance in the operation of a mechanism which requires no technical knowledge of the science does not constitute the practice of optometry, within the meaning of the act. I am of the opinion that the use of this appliance and its operation by the seller does not come within the prohibition of the statute if neither advice nor instruction is given to the customer.

The form of your question suggests that caution should be used in any representation that this appliance provides a method or means of making an examination of the eyes which will afford a complete test of the vision. From the papers accompanying your letter it would appear that the so-called auto eye tester operates only to test the eyes as to farsightedness, nearsightedness and failing eyesight due to old age. It apparently does not test the eyes for astigmatism or other defects of vision. If this assumption is correct, the name of the appliance is itself misleading. Unless it is made clear in any advertisement or representation that the appliance affords only a partial test of the eyes, a customer suffering from astigmatism might be induced to purchase eyeglasses which afforded some relief with respect to far or near sight in the belief that the appliance afforded a full test of defects of vision.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Insurance — Mutual Fire Insurance Company — By-laws — Election of Directors — Rights of Policyholders and Guaranty Stockholders in Such Election.

A by-law of a mutual fire insurance company, which provides that the board of directors shall be chosen, one-half by and from the policyholders, and one-half by and from the guaranty stockholders, is invalid because it is in conflict with the provisions of St. 1907, c. 576, § 43, as amended by Gen. St. 1915, c. 7.

The policyholders and the guaranty stockholders of a mutual fire insurance company have equal rights in electing the entire board of directors.

OCT. 11, 1920.

HON. CLARENCE W. HOBBS, *Commissioner of Insurance.*

DEAR SIR:— You request my opinion on the following question of law: A mutual fire insurance company having a guaranty capital of \$100,000, in accordance with the provisions of St. 1907, c. 576, § 45, has had since 1872 a by-law as follows, viz.:—

Section 1 of Article II.

There shall be elected by ballot a board of not less than eight nor more than twelve directors, one-half of whom shall be chosen by and from the members and one-half by and from the stockholders.

Your question is as to whether or not this by-law and the election of directors, half by and from the policyholders and half by and from the guaranty stockholders, is the proper mode of procedure.

A fundamental and one of the most important features of a mutual fire insurance company is the provision that every person insured by such a company is a member while his policy is in force, and entitled to one vote for each policy that he holds. The power of such a member to vote as to whom he desires to be upon the board of directors of such a company is an essential feature of the mutual fire insurance business.

The statutory provisions pertinent thereto are found in St. 1907, c. 576, § 43, as amended by Gen. St. 1915, c. 7. Said section 43, as amended, provides, in part, as follows:—

Every person insured by a mutual fire insurance company shall be a member while his policy is in force, entitled to one vote for each policy he holds, and shall be notified of the time and place of holding its meetings by a written notice.

.

Every such company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business. . . .

A majority at least of the directors shall be citizens of this commonwealth, and, after the first election, members only shall be eligible, but no director shall be disqualified from serving the term for which he was chosen by reason of the expiration or cancellation of his policy: *provided, that, in companies with a guaranty capital, one-half of the directors shall be chosen from the stockholders.*

The provisions as to companies with a guaranty capital are found in section 45 of said chapter 576.

The guaranty stockholders' power to vote, as provided in the above section, is as follows: —

Shareholders and members of such companies shall be subject to the same provisions of law relative to their right to vote as apply respectively to shareholders in stock companies and policy holders in purely mutual companies.

It is my opinion that the provisions of the by-law of the insurance company in question are not in accord with the requirements of the statute. The policyholders and the guaranty stockholders of a mutual fire insurance company have equal rights in electing the entire board of directors. It is true that the policyholders of such a company greatly outnumber the guaranty stockholders, and doubtless this was the reason that the proviso was added to clause 8 of section 43 of said chapter 576, requiring that in companies with a guaranty capital, one-half of the directors should be chosen from the stockholders. To go further and attempt to read into the statute a right of the guaranty stockholders to elect the stockholder directors, without participation in the vote by the policyholders, is not only to make an implication that is not warranted, but it violates the rights secured to the policyholders by the statute, because "every person insured" is a member "entitled to vote" in the election of directors. If the Legislature had intended that one-half of the directors should be chosen from and by the stockholders, it would have so provided.

Very truly yours,

J. WESTON ALLEN, *Attorney-General.*

*Citizenship — Status of American Women married to Aliens
prior to March 2, 1907.*

American women married to aliens prior to March 2, 1907, retain their American citizenship, while those subsequently married to aliens take the nationality of their husbands.

OCT. 13, 1920.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth.*

DEAR SIR: — You request my opinion as to whether a woman who was an American citizen, and who, prior to March 2, 1907, married an alien, retains her American citizenship and is entitled to register and vote.

On March 2, 1907, Congress enacted a statute, the third section of which provides: —

That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

The question you have raised, namely, what is the status of an American woman who married a foreigner prior to the statute of 1907, has been the subject of more or less controversy for many years, and there has been no judicial determination of this precise point by the highest court of either this Commonwealth or the United States.

In the case of *Shanks v. Dupont*, 3 Pet. 242 (1830), the plaintiff, a woman, under age, resided with her father in Charleston, S. C., when that city was captured by the British forces in 1780. She married a British officer in 1781, left America with him the following year, went to England, and remained there until her death in 1801. The question of her citizenship was involved, and the court held that her removal from the United States operated as a virtual dissolution of her allegiance, and fixed her future allegiance to the British Crown by the Treaty of Peace of 1783.

The question presented by your inquiry was not before the court, but Mr. Justice Story, in his opinion, after stating that the capture and possession of Charleston did not annihilate or destroy the allegiance of the captured inhabitants, said: —

Neither did the marriage with Shanks produce that effect; because marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges. The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens.

The rule stated by Mr. Justice Story, that no person, by any act of his, without the consent of the government, can put off his allegiance and become an alien, was declared otherwise by Congress in the act of July 27, 1868, now U. S. Rev. St. § 1999, which reads as follows: —

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof: and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

In 1883 it was held by the United States Circuit Court that a French woman who had become naturalized under the statute by a marriage with an American citizen will again become an alien by a second marriage to a French citizen residing in this country. *Pequignot v. Detroit*, 16 Fed. Rep., 211 (C. C. 1883).

In that case Judge Brown expressed doubt as to the binding force of *Shanks v. Dupont*, in view of the act of July 27, 1868, which expressly recognizes the inherent right of expatriation, and of the act of Feb. 10, 1855, which provides that any woman married to an American citizen should be deemed a citizen, and observed that —

It seems to me . . . that we ought to apply the maxim "*cessante ratione, cessat lex*" to this case, and are not bound to treat it as controlling authority.

He added: —

We should regard the sections above quoted as announcing the views of Congress upon this branch of international law, and ought to apply the same rule of decision to a case where a female American citizen marries an alien husband, that we should to a case where an alien woman marries an American citizen.

The reasoning of Judge Brown, however, has not met with approval in later decisions. In *Comitis v. Parkerson*, 56 Fed. Rep., 556 (C. C. 1893), the plaintiff, a native citizen of Louisiana, married a native-born subject of Italy, who had come to Louisiana and engaged in business. The husband never became naturalized, but they resided in Louisiana until his death, and the plaintiff thereafter continued to reside there. The court, referring to the act of July 27, 1868, said: —

But, even if Congress, in the preamble to the act of 1868, had meant to declare that there might be expatriation effected in connection with other means than by naturalization abroad, the settled doctrine as to expatriation would prevent the plaintiff from being regarded as expatriated. Expatriation must be effected by *removal from the country*. It cannot be denied that whatever right of expatriation Congress meant to declare by the act of 1868 is in the express language of the preamble based entirely upon the inborn right to seek happiness by free removal from one country to another. It could not, therefore, have been intended by Congress in that act that citizens should expatriate themselves, and remain permanently within the country. . . .

My conclusion, therefore, is that . . . even if Congress meant to imply that expatriation from the United States might be effected by means other than naturalization in a foreign country, it must have meant that it should be conditioned upon actual departure from the country.

It does not affect the conclusion that the domicile of the wife was controlled by that of the husband. Whether decided by her or by one whom she had authorized to decide for her, the fact of her residence here, with the purpose on the part of her husband and herself to remain here always, is, as it seems to me, both upon principle and authority, an insuperable obstacle in the way of her ceasing to be considered a citizen of the United States.

The court referred to *Pequignot v. Detroit*, *supra*, and said: —

But in that case the facts characterizing the residence of the husband and wife may have made it what the public writers term temporary residence, whereas the intent of the plaintiff and her husband (in this case) was to remain in the United States always.

The question at issue was referred to in the case of *Ruckgaber v. Moore*, 104 Fed. Rep., 947. The precise point involved in this case, which was before the Circuit Court of New York, was the status of a native-born American woman marrying a citizen of France and removing with him to his country; and the court held that her citizenship followed that of her husband. In the discussion of the case, however, the court said: —

By the several statutes of America, France, and Great Britain, the marriage of a citizen of such country with an alien wife confers upon the latter the citizenship of the husband; and this policy of three great powers, in connection with section 1999 of the Revised Statutes, which proclaims that expatriation is an inherent right, establishes that the political status of the wife follows that of her husband, *with the modification that there must be withdrawal from her native country, or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage.*

In 1908 the United States Circuit Court in Nebraska heard the case of *Wallenburg v. Mo. Pac. Rwy. Co.*, 159 Fed. Rep. 217, involving the citizenship of an American woman who had married an alien prior to 1907 and remained in this country. The court, after citing authorities, said: —

Without undertaking to review the reasons given for the conclusions reached in each of the foregoing cases, I am clearly of the opinion that a woman, a citizen of the United States, does not lose that citizenship by marriage to an alien, at least so long as she continues to reside in the United States. . . .

It will be observed that the foregoing case was decided after the passage of the act of 1907, but dealt with a situation arising before that year.

The case of *Mackenzie v. Hare*, 239 U. S., 299, decided in 1915, involved the status of an American woman who married an alien after the passage of the act of March 2, 1907, but continued to reside in the United States. It was argued by the plaintiff, who sought to be registered as a voter in California, that her American citizenship was an incident to her birth in the United States, and that under the Constitution and laws it became a right, privilege and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation. In holding that under the act of March 2, 1907, the plaintiff, by her marriage

to an alien, had elected to give up her American citizenship, even though both the plaintiff and her husband continued to reside here, the court said: —

Only voluntary expatriation, as she defines it, can divest a woman of her citizenship, she declares; the statute provides that by marriage with a foreigner she takes his nationality. . . . There need be no dissent from the cases cited by plaintiff; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions upon it. It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy (March 2, 1907) does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. . . . The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the government into embarrassments, and, it may be, into controversies. It is as voluntary and distinctive as expatriation, and its consequence must be considered as elected.

Upon a consideration of the foregoing cases, even if we put aside *Shanks v. Dupont* as inapplicable because of the act of July 27, 1868, the weight of authority seems to establish that an American woman who, prior to March 2, 1907, married an alien but still continued to reside in this country did not lose her citizenship.

It may be observed that, giving to the language of the statute of March 2, 1907, its ordinary signification, it appears to refer to future marriages. The words are "any woman who marries a foreigner." There is nowhere in the statute any indication that it was intended to be retroactive, and the rule of construction, that a statute will not be held to be retroactive unless such a purpose appears in the statute itself, must apply. Nor is there anything in the language of the statute to indicate that it was intended to be declaratory of the then existing law.

The provisions for the resumption of citizenship, after the termination of the marital relation, make a change in existing law.

Until the Supreme Court of the United States shall declare

otherwise, I am of the opinion that the case of *Wallenburg v. Mo. Pac. Rwy. Co.*, *supra*, following the weight of authority and decided after the passage of the statute in respect to a marriage which took place before the passage of the statute, must be held to declare the then existing law, and should be followed.

I therefore advise you that an American woman who, prior to March 2, 1907, married an alien, if she has continued to reside in this country, retains her American citizenship, and is entitled to register and vote if domiciled here and otherwise qualified.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Set-off — Defunct Trust Company — Set-off of Deposit in Commercial Department against Debt due to Commercial Department — Set-off of Deposit in Savings Department against Debt due to Commercial Department — Set-off of Deposit in Commercial Department against Debt due to Savings Department — Time when Set-off may be made by Commissioner of Banks — Equitable Set-off.

The principle upon which set-off rests is that in all final adjustments between debtor and creditor the actual balance, after setting off all mutual demands against each other, is the true debt.

A set-off does not constitute a preference.

The rules of set-off are applicable to a trust company in process of liquidation under St. 1910, c. 399.

Where a trust company is in process of liquidation under St. 1910, c. 399, a deposit in the commercial department may be set off against a debt due to the commercial department, in accordance with the rules prescribed by R. L., c. 174, §§ 1-11.

Under similar conditions a deposit in the savings department may be set off against a loan due to the commercial department.

Since St. 1908, c. 520, makes the depositors in the savings department of a trust company preferred creditors with respect to deposits in such department and the investments or loans of such deposits, a deposit in the commercial department of a trust company in process of liquidation under St. 1910, c. 399, cannot be set off against a loan due to the savings department of such trust company.

Where a trust company is in process of liquidation under St. 1910, c. 399, a set-off which is otherwise proper may be made at any time if it results in a debt due to the trust company, but if the allowance of the set-off would result in a dividend to the creditor, it cannot be made until the provisions of St. 1910, c. 399, §§ 8 and 11 are complied with.

OCT. 14, 1920.

Mr. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR: — By letters supplemented by oral interviews you state that, pursuant to authority conferred by St. 1910, c. 399, you have taken possession of certain trust companies and are proceeding to liquidate the same. You then make the following inquiries: —

1. Is a depositor in the commercial department of such a trust company entitled to set off such deposit against a debt presently due to such department?

2. Is a depositor in the commercial department entitled to set off that deposit against a loan presently due to the savings department?

3. Is a depositor in the savings department entitled to set off such deposit against a loan presently due to the commercial department?

4. If set-off is required in any or all of these cases, may the depositor require that the set-off be made now, or may the Commissioner postpone it until after claims have been duly proved in accordance with St. 1910, c. 399, § 8?

1. The principle upon which set-off rests is "that in all final adjustments between debtor and creditor the actual balance, after setting off all demands against each other, is the true debt." *Commonwealth v. Phoenix Bank*, 11 Met. 129, 137, per Shaw, C.J. It is a principle of wide application. It had its origin in equity, but has been applied by statute (R. L., c. 174, §§ 1-11) to actions at law. It applies to commercial transactions between banker and customer (*Wood v. Boylston Bank*, 129 Mass. 358; *National Mahaiwe Bank v. Peck*, 127 Mass. 298), as well as to actions at law between them. *Commonwealth v. Phoenix Bank*, 11 Met. 129; *Demmon v. Boylston Bank*, 5 Cush. 194; *Colt v. Brown*, 12 Gray, 233; *Clark v. Northampton Bank*, 160 Mass. 26. But if business is carried on upon the assumption that the net obligation, after setting off mutual demands, constitutes the true debt, it would be unjust if the principle ceased to apply in case one party or the other becomes bankrupt or insolvent. If one party must pay his obligation in full, while receiving in return only a dividend upon the obligation due to him, the amount of the true debt would be increased by the bankruptcy or insolvency. Such is not the law. The principle of set-off was applied expressly to insolvency proceedings by R. L., c. 163, § 34, and still governs in bankruptcy under

section 68 of the Federal bankruptcy act. A set-off, therefore, does not constitute a preference either in bankruptcy or under the State insolvency act, which was superseded by the Federal law.

Banks were expressly excepted from the State insolvency law (R. L., c. 163, § 143) and are now excepted from the operation of the Federal bankruptcy act by section 4. Formerly insolvent banking corporations under State jurisdiction were liquidated under statutes which authorized a petition in equity praying for the appointment of receivers. *Atlas Bank v. Nahant Bank*, 23 Pick. 480; 3 Met. 581; *Hubbard v. Hamilton Bank*, 7 Met. 340. In such proceedings the principle of set-off has been uniformly applied, even though no statute expressly made it applicable. *Commonwealth v. Phoenix Bank*, 11 Met. 129; *Colt v. Brown*, 12 Gray, 233; see also *Commonwealth v. Shoe & Leather Dealers Ins. Co.*, 112 Mass. 131; *Jones v. Arena Publishing Co.*, 171 Mass. 22, 28, 29; *Merrill v. Cape Ann Granite Co.*, 161 Mass. 212. Generally the court followed the analogy of set-off at law (see cases last cited), but it possesses inherent power as a court of equity to apply the principle of equitable set-off more broadly in order to prevent injustice. *Merrill v. Cape Ann Granite Co.*, 161 Mass. 212, 217. In the case of insolvent savings banks there is an express statutory provision authorizing set-offs (St. 1878, c. 261; R. L., c. 113, § 37; St. 1908, c. 590, § 49), but this enactment has been held to be merely declaratory. *Barnstable Sav. Bank v. Snow*, 128 Mass. 512; *North Bridgewater Sav. Bank v. Soule*, 129 Mass. 528. The procedure provided by St. 1910, c. 399, is a substitute for the proceeding in equity referred to above. In my opinion, the analogy of set-off at law (see R. L., c. 174, §§ 1-11), which was applicable to the equity proceeding, is still applicable to the liquidation proceeding under St. 1910, c. 399.

To avoid misconception, let me add that I leave for future consideration the question as to whether any particular set-off would be proper. That must be decided under the particular circumstances of each case, considered in the light of R. L., c. 174, §§ 1-11. I further suggest that if in any case the somewhat broader principles of equitable set-off should be invoked (see *Merrill v. Cape Ann Granite Co.*, 161 Mass. 212), it would be proper to refer the matter to the court for its determination.

2. Savings banks are forbidden to occupy the same or even a connecting office with a national bank, trust company or other bank of discount, and must not have certain executive officers in common with any such banking institution (St. 1908, c. 590, §§ 19, 20). St. 1908, c. 520, § 1, permits trust companies to maintain a savings department, but subject, nevertheless, to the stringent restrictions upon the management of the assets of such department which are imposed by sections 2, 3, 4 and 5 of said act. In *Old Colony Trust Co. v. Commonwealth*, 220 Mass. 409, 410, the court, by Chief Justice Rugg, said:—

The conduct of savings departments by trust companies is regulated by St. 1908, c. 520. All deposits made in such departments with the accounts relating thereto must be kept distinct from the general business of the corporation, except that the net profits accruing may be transferred to the general funds. All such deposits must be maintained separate from other deposits and invested in accordance with laws governing the investment of deposits in savings banks.

And the restrictions upon loans by a savings department of a trust company have been considered in III Op. Atty.-Gen., 454; IV *ibid.*, 8. Although there is no doubt that the relation between the savings department and depositors therein is that of debtor and creditor (see *J. S. Lang Eng. Co. v. Commonwealth*, 231 Mass. 367), it is also clear that such depositors are preferred creditors with respect to the assets of the savings department. Section 3 of said chapter 520 provides as follows:—

Such deposits and the investments or loans thereof shall be appropriated solely to the security and payment of such deposits, and shall not be mingled with the investments of the capital stock or other money or property belonging to or controlled by such corporation, or be liable for the debts or obligations thereof until after the deposits in said savings department have been paid in full. The accounts and transactions of said savings department shall be kept separate and distinct from the general business of the corporation.

Construing the restrictions imposed upon trust companies by St. 1908, c. 520, §§ 1 to 5, in regard to the management of the savings departments which they are thereby permitted to establish, in the light of the prohibitions which St. 1908, c. 590, §§ 19 and 20, impose upon savings banks, I am of

opinion that a trust company holds the assets of its savings department in a special capacity for special purposes, which purposes are not accomplished until the savings depositors are paid in full.

Set-off at law is in essence a cancellation of mutual credits. It is a mode of making a settlement between the parties. It cannot be applied so as to prejudice third parties or to deprive them of any rights. A credit due to A in his personal capacity cannot be set off against or canceled by a debt owed by A in his representative capacity. R. L., c. 174, § 6. *Seaver v. Weston*, 163 Mass. 202; *Rochester Tumbler Works v. Mitchell Woodbury Co.*, 215 Mass. 194, 198. To do so would in effect make A's beneficiary pay A's debt. These considerations are, in my opinion, decisive of your second question. To permit the owner of a deposit in the commercial department of a trust company in liquidation to set it off at law against a debt due to the savings department would deplete the assets of the savings department to the possible prejudice of other savings depositors, since the two obligations would be canceled either wholly or *pro tanto* without restoring to the savings department the money borrowed from it. It may be that in a proper case a court of equity might direct that the amount ultimately due in liquidation to the commercial depositors should be transferred to the savings department in order to reduce the depositors' indebtedness to it *pro tanto*. See *Merrill v. Cape Ann Granite Co.*, 161 Mass. 212, 217; *Perry v. Pye*, 215 Mass. 403; *Cromwell v. Parsons*, 219 Mass. 299. But this is not a cancellation of cross demands which is a substitute for payment, but an actual payment. I am therefore of opinion that in the ordinary case, unmodified by special circumstances, a debt due from A to the savings department of a trust company in liquidation cannot be canceled at law by a deposit due to A in the commercial department of the same trust company.

3. Other considerations govern the converse case of a deposit in the savings department and a debt due to the commercial department. In this case no prejudice to the savings department can result from a cancellation of one debt against the other. Indeed, the savings depositors benefit, since the obligations of the savings department are reduced by the set-off and cancellation without any corresponding reduction of the assets of the savings department. Nor can

the other savings depositors complain because this particular savings depositor obtains the benefit of the face value of his obligation, while they, perhaps, receive less by way of dividend. A set-off, for the reasons already given, is not open to the objection that it operates as a preference. Nor can the depositors in the commercial department successfully object. St. 1908, c. 520, § 4, provides as follows:—

The capital stock of such corporation with the liabilities of the stockholders thereunder shall be held as security for the payment of such deposits, and the persons making such deposits or entitled thereto shall have an equal claim with other creditors upon the capital and other property of the corporation in addition to the security provided for by this act.

Savings depositors have “an equal claim with other creditors of the corporation upon the capital and other property of the corporation, *in addition* to the security provided by” said St. 1908, c. 520. The fact that savings depositors are preferred over commercial depositors with respect to the assets of the savings department does not confer upon commercial depositors a corresponding preference over savings depositors with respect to the other assets of the trust company. I am therefore of opinion that in the ordinary case, unmodified by special circumstances, a deposit by A in the savings department of a trust company in liquidation may be set off against a debt due from A to the commercial department.

4. Your fourth inquiry raises the question when a set-off, if proper, may be made. The material provisions of St. 1910, c. 399, are found in sections 4, 8 and 11, which read as follows:—

SECTION 4. Upon taking possession of the property and business of such bank, the bank commissioner shall have authority to collect moneys due to the bank, and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate its affairs as hereinafter provided. He shall collect all debts due and claims belonging to it, and upon the order or decree of the supreme judicial court, or any justice thereof, may sell or compound all bad or doubtful debts, and on like order or decree may sell all, or any part of, the real and personal property of the bank on such terms as the court shall direct; and he may, if necessary, to pay the debts of any such trust company, enforce the individual liability of the stockholders.

SECTION 8. The bank commissioner shall cause to be published weekly for three consecutive months, in such newspapers as he may direct, a notice calling on all persons who may have claims against such bank to present the same to the bank commissioner and to make legal proof thereof at a place and in a time, not earlier than the last day of publication, to be therein specified. The bank commissioner shall mail a similar notice to all persons whose names appear as creditors upon the books of the bank, so far as their addresses are known. If the bank commissioner doubts the justice and validity of any claim, he may reject the same and serve notice of such objection upon the claimant either by mail or person. An affidavit of service of such notice, which shall be prima facie evidence thereof, shall be filed with the bank commissioner. An action upon the claim so rejected shall not be entertained unless brought within six months after such service. Claims presented after the expiration of the time specified in the notice to creditors shall be entitled to share in the distribution only to the extent of the assets in the hands of the bank commissioner equitably applicable thereto.

SECTION 11. At any time after the expiration of the date fixed for the presentation of claims the supreme judicial court, upon the application of the bank commissioner, may authorize him to declare out of the funds remaining in his hands, after the payment of expenses, one or more dividends, and, after the expiration of one year from the first publication of notice to creditors, the bank commissioner may declare a final dividend, such dividends to be paid to such persons, in such amounts, and upon such notice as may be directed by the supreme judicial court for the county in which the principal office of such bank was located, or as may be directed by a justice of said court. Objections to any claim not rejected by the bank commissioner may be made by any person interested by filing a copy of such objections with the bank commissioner, who shall present the same to the supreme judicial court at the time of the next application for leave to declare a dividend. The court to which such application is made shall thereupon dispose of said objections, or may refer them to a master for that purpose, and should the objections to any claim be sustained by the court or by the master no dividend thereon shall be paid by the bank commissioner until the claimant shall have established his claim by the judgment of a court of competent jurisdiction. The court may make proper provision for unproved or unclaimed deposits.

I am of opinion that the question when a set-off, if proper, may be made depends upon whether the effect of the set-off, if made, will or will not result in a dividend to the depositor. Section 4, it will be observed, authorizes the commissioner

"to collect moneys *due to the bank*." If the true debt is the net amount due after making such set-off as may be proper, it seems plain that the authority to collect it must also include authority to determine the amount thereof and to allow such set-off as may be proper as an incident of collection. I am confirmed in this view by the consideration that the debtor might force such set-off by refusing to pay and compelling the commissioner to sue, in which case he, as the defendant, might plead any set-off permitted by R. L., c. 174, §§ 1-11, inclusive. On the other hand, it is plain that no dividend can be paid to any creditor of the trust company until St. 1910, c. 399, §§ 8 and 11, have been complied with. If, therefore, all proper set-offs, if made, leave an amount still due to the depositor, he must, in order to collect, comply with section 8, and cannot collect except in the manner provided by section 11. Any set-off must be made in those proceedings. I am therefore of opinion that the question when a proper set-off may properly be made depends upon whether the result of it is to leave the trust company a debtor or a creditor of the depositor. It may be made at any time as an incident of collecting a debt due to the trust company; it cannot properly be made except in connection with the payment of a dividend pursuant to sections 8 and 11, if it results in a debt due from the trust company.

I may add that the opinion rendered to your Department by my predecessor on Jan. 15, 1920, may well be confined to the latter situation.

I therefore advise you in answer to your specific questions as follows:—

1. In the absence of special circumstances, the answer to your first question is "Yes." I may add that, in view of R. L., c. 113, § 37, as re-enacted in St. 1908, c. 590, § 49, like considerations govern the set-off of a deposit in the savings department against a debt due to that department.

2. In the absence of special circumstances, the answer to your second question is "No." I may add, however, that the court, in the exercise of its equity powers, might, through its control of the parties before it, work out some form of equitable set-off even in such a case, if justice required it.

3. In the absence of special circumstances, the answer to your third question is "Yes."

4. In my opinion, the question as to when a proper set-off

should be made depends upon whether it results in a debt to or a debt from the trust company. If it results in a debt to the trust company, it may be made at any time pursuant to the power to collect moneys due to the trust company, which is conferred by St. 1910, c. 399, § 4. If it results in a debt due from the trust company, it can only be made in connection with the payment of a dividend pursuant to St. 1910, c. 399, §§ 8 and 11.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Trust Company — Relation of Company to Holder of Safe Deposit Box — Right to hold Contents of Safe Deposit Box to meet Contingent Liability to Company.

In view of R. L., c. 116, § 38, and St. 1910, c. 399, § 12, the relation between a trust company and the holder of a safe deposit box is that of landlord and tenant.

The contents of a safe deposit box rented from a trust company are not in the possession of the trust company.

Where the Commissioner of Banks has taken possession of a trust company under St. 1910, c. 399, he cannot refuse to a director of such trust company, who has rented a safe deposit box, permission to remove the contents of such box, upon the ground that such director may be subject to directors' liability.

OCT. 19, 1920.

MR. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR: — You have asked my opinion upon the following case: —

A director in a trust company rented a safe deposit box from the trust company and placed in it certain securities and personal property, the nature of which is unknown to you. The rental agreement provides that the relation of the trust company to the boxholder shall be that of landlord and tenant, and expressly disclaims any possession of the contents of the box, either as bailee or otherwise. The trust company reserves a right, in case possession of the box is not surrendered at the end of the term, to open the box forcibly, remove the contents and hold the same as a special deposit for safekeeping, and, in that event, claims a lien upon the contents for rent due and for its fair charges for storing the contents. Access to the box is obtained by simultaneous use of two different keys, one of which is kept by the trust

company and one by the boxholder. Neither the trust company nor the boxholder can unlock the box without employing the key which is held by the other. You state that you have taken possession of the trust company under the authority conferred by St. 1910, c. 399, and that you have reason to believe that the director in question, who has rented the box, may be liable to the trust company by reason of his acts as director, but do not further indicate the nature or extent of such possible liability. You inquire whether you can properly deny to such director permission to remove the contents of such box, in order to retain such contents as security for or as an offset to such possible liability.

R. L., c. 116, § 38, authorizes corporations "organized for the purpose of letting vaults, safes or other receptacles" to take certain steps in case the "amount due for rent" is not paid. St. 1910, c. 399, § 12, authorizes the Bank Commissioner, after he has taken possession of the trust company, to take certain steps to cause the owner of any property deposited in such rented box or safe to remove the same. In my opinion, these provisions are a clear statutory recognition that the relation between the trust company and the boxholder is that of landlord and tenant. If so, the contents of the box are in no sense in the possession of the trust company by reason of that relation, nor can the trust company, or the commissioner in possession thereof, successfully maintain a right of lien upon the contents of said box, or a right of set-off against them, in order to satisfy a supposed liability of the boxholder to the trust company as director of such company.

Other considerations confirm me in this conclusion. The so-called banker's lien upon the *general* deposit of a customer is really a right of commercial set-off. In the absence of some special agreement to the contrary, the banker may apply a general deposit to any matured debt of the customer which the banker may select, unless such debt is already fully secured by collateral. *Furber v. Dane*, 203 Mass. 108, 117-118. But he cannot retain a general deposit or apply it in order to reduce an indebtedness not yet due. *Wiley v. Bunker Hill National Bank*, 183 Mass. 495; *Spaulding v. Backus*, 122 Mass. 553. So, also, collateral pledged to a bank to secure a specified demand cannot, in the absence of agreement, be held for other demands against the same debtor. *Hathaway v. Fall River National Bank*, 131 Mass. 14; *Brown*

v. *New Bedford Institution for Savings*, 137 Mass. 262. And a bank which has a mere naked custody of notes, without authority to sell or dispose of them, cannot set them off even against a debt already due. *Stetson v. Exchange Bank*, 7 Gray, 425.

On the facts given it appears that the supposed liability has not been determined to exist. In this aspect of the case the trust company can scarcely stand better than if it held a definite but unmatured obligation. So, also, the trust company has not even a naked custody of the contents of the director's safe deposit box. In this view of the matter the trust company is in a weaker position than the bank in the *Stetson* case. I am therefore constrained to advise you that no ground has been shown for retention of the contents of this director's safe deposit box.

I leave for future consideration the question whether the trust company could reach and apply the contents of such a box in equity under the provisions of R. L., c. 159, § 3, cl. 7, in order to satisfy a "debt" presently due and payable. *Hosbor-Platt v. Miller*, 190 Mass. 285; *Hopedale Mfg. Co. v. Clinton Cotton Mills*, 224 Mass. 193.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Set-Off — Trust Company in Possession of Commissioner of Banks.

Where a depositor in a trust company in the possession of the Commissioner of Banks under St. 1910, c. 399, is indebted to the company in a sum less than the amount of his deposit, the Commissioner may in his discretion permit a set-off to the amount of the debt before the time limited for proof of claims.

OCT. 27, 1920.

Mr. JOSEPH C. ALLEN, *Commissioner of Banks*.

DEAR SIR: — In connection with the opinion rendered to you on Oct. 14, 1920, you have orally requested my opinion on the following case: —

The Commissioner of Banks has taken possession of a trust company pursuant to authority conferred by St. 1910, c. 399. A is presently indebted to the commercial department of the trust company upon a note for \$1,000, secured

by collateral. A has a deposit of \$1,050 in the commercial department of the trust company. Can the Commissioner of Banks set off \$1,000 of such deposit against the note, and release the collateral, prior to the time when claims are proved and a dividend allowed under sections 8 and 11 of said act, or must he wait until the claim is proved under section 8 and a dividend is payable under section 11 before making any set-off whatsoever?

In the opinion rendered Oct. 14, 1920, I advised you that if, in a case where set-off was proper, the set-off, if made, would result in an indebtedness from the customer to the trust company, the Commissioner, as an incident of collecting such indebtedness, might allow such set-off without waiting for proof of claims under section 8. I further advised you that if, in a case where set-off was proper, the set-off, if made, would result in a dividend to the depositor, the set-off could not be made until sections 8 and 11 were complied with and the liquidation was ripe for the payment of a dividend. The case which you now put is the case where a portion of the debt due from the trust company is sought to be canceled against the whole debt due to the trust company, leaving the balance due from the trust company as the net claim to be proved on account of dividends. This is in accordance with the principle upon which set-off rests, namely, "that in all final adjustments between debtor and creditor, the actual balance, after setting off all mutual demands against each other, is the true debt." *Commonwealth v. Phoenix Bank*, 11 Met. 129, 137. It is not, in my opinion, forbidden by section 8. The provision of section 8 which prescribes that the *notice* shall call on claimants to make legal proof of claims "at a place and in a time not earlier than the last day of publication, to be therein specified" should, in my opinion, be held to be directory, rather than a limitation upon the power of the Commissioner, in the exercise of a sound discretion, to allow a claim which is presented at an earlier date. Nor is it in conflict with section 11, since the partial set-off in question results in no dividend. Assuming, therefore, that the set-off is otherwise proper, I am of opinion that the Commissioner of Banks, in the exercise of a sound discretion, may make the partial set-off in question before the expiration of the time limited by the notice given under section 8 for the proof of claims. On the other hand,

he may, in any case where he deems it expedient, postpone the set-off until claims have been proved and the claim in question is ripe for dividend.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Massachusetts Society for the Prevention of Cruelty to Animals —
Cruelty to Animals — Disposition of Fines.*

Being present at a place where preparations are being made for the exhibition of the fighting of birds, which is made a crime subject to fine or imprisonment by R. L., c. 212, § 86, is not cruelty to animals, under R. L., c. 212, § 76.

The Massachusetts Society for the Prevention of Cruelty to Animals is not entitled, under R. L., c. 212, § 76, to any part of fines collected from defendants upon convictions under R. L., c. 212, § 86, upon complaint of an agent of the Massachusetts Society for the Prevention of Cruelty to Animals for being present at a place where preparations were being made for the exhibition of the fighting of birds.

OCT. 28, 1920.

MR. THEODORE N. WADDELL, *Director of Accounts, Department of Corporations and Taxation*.

DEAR SIR: — A number of defendants were found guilty and fined under R. L., c. 212, § 86, upon complaint of an agent of the Massachusetts Society for the Prevention of Cruelty to Animals that they were present "at a certain place . . . where preparations were being made for the exhibition of the fighting of birds." You inquire whether such fines are payable to the said society, under R. L., c. 212, § 76, which provides as follows: —

Sheriffs, deputy sheriffs, constables and police officers shall prosecute all violations of the provisions of sections seventy to seventy-three, inclusive, which come to their notice, and upon all convictions for cruelty to animals the fines collected upon or resulting from the complaint or information of an officer or agent of the Massachusetts Society for the Prevention of Cruelty to Animals shall, except as provided in the following section, be paid over to said society after deducting therefrom for the expense of prosecution such amount as the court or trial justice shall order.

St. 1868, c. 212, being an act entitled "An Act for the more effectual prevention of cruelty to animals," defined and prescribed punishment for certain offences now included in

R. L., c. 212, §§ 70, 71 and 73. Section 8 of said act of 1868 provided, in substance, that fines collected upon information or complaint of any officer or agent of said society "under this act" shall be paid over to said society. St. 1868, c. 212, was repealed, except as to prosecutions then pending thereunder and offences theretofore committed, by St. 1869, c. 344, which act bore the same title, more fully defined and punished similar offences, and contained a similar provision for payment to said society of the fines and forfeitures "under this act" resulting from the complaint or information of any officer or agent of said society. St. 1869, c. 344, was codified in Pub. Sts., c. 207, §§ 52, 53, 54, 55 and 59, but such verbal changes as may have been incident to such codification are presumed not to have changed the meaning of the laws then in force, unless the intention to change clearly appears. *Wright v. Dressel*, 140 Mass. 147, 149. It follows that under Pub. Sts., c. 207, § 59, the Society for the Prevention of Cruelty to Animals was not entitled to receive the fines resulting from a complaint by an officer or agent of that society unless the conviction was obtained under Pub. Sts., c. 207, §§ 52 to 55, inclusive, to which sections R. L., c. 212, §§ 70, 71 and 73, now correspond.

The right of said society to receive the fines upon a conviction resulting from the complaint or information of an officer or agent of said society was, however, enlarged by St. 1891, c. 304, which provides as follows: —

In all cases of prosecution for cruelties inflicted upon dumb animals, the fines collected upon or resulting from the complaint or information of any officer or agent of the Massachusetts Society for the Prevention of Cruelty to Animals shall be paid to said society, less a sum equal to the expense of prosecution, which sum shall be determined by the court or trial justice.

To this statute must be traced the provision of R. L., c. 212, § 76, that "upon *all* convictions for cruelty to animals the fines collected upon or resulting from the complaint or information of an officer or agent of" said society should be paid to said society. This requires that the words "cruelty to animals," as used in said section, be construed to mean "cruelties *inflicted upon* dumb animals." But these more restricted words can scarcely be held to include the offence of being "present" at a place where preparations are being

made for the fighting of birds, for which offence these defendants were convicted under R. L., c. 212, § 86. While such preparations may ultimately lead to the infliction of cruelty upon the birds, that point has not yet been reached. Such a conclusion is by no means satisfactory, since it deprives a society organized to prevent cruelty to animals of fines which result from its vigilance in preventing such cruelty. The remedy must, however, be sought from the Legislature. I am therefore constrained to advise you that said society is not entitled to the fines in question.

I may add that, in view of R. L., c. 212, § 77, the words "cruelty to animals," as used in section 76, cannot be construed to include the offence defined by section 72.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Elections — Absent Voters' Ballots — When to be cast.

Under the provisions of Gen. St. 1919, c. 289, an absent voter's ballot can neither be cast nor counted unless it arrives at the proper polling place upon the day of election, in time for delivery to the election officers before the polls are declared closed.

OCT. 29, 1920.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth*.

DEAR SIR:— You state that you have received from the Board of Election Commissioners of the City of Boston an inquiry which reads as follows:—

Can absent voters' ballots received at this office up to 5 P.M. Tuesday, November 2, the day of the State election, said 5 P.M. being the time for closing the polls of Boston, be then sent to the several precincts of the city, to be cast and counted by the election officers of the several precincts?

The ballots in many cases would not reach the precincts until one-half to one hour after the polls are closed.

This applies to section 9 of Gen. St. 1919, c. 289, entitled "An Act to permit absent voters to vote at state elections."

You ask my opinion in regard to this question.

The provisions for absent voting are contained in Gen. St. 1919, c. 289. Section 7 provides, in part, as follows:—

A voter who has executed and filed an application for an official absent voting ballot with the clerk of the city or town in which he is a

registered voter, or, in the case of voters coming within the provisions of section five, with such city or town clerk or the secretary of the commonwealth, may, after his application is certified as provided in the preceding section, vote by mailing to such city or town clerk an official absent voting ballot, prepared under the provisions of section two. . . .

Section 8 provides that all ballots cast under the provisions of section 7 "shall be mailed on or prior to the day of election." Section 9 requires the city or town clerk to attach the application to the ballot, and further provides: —

Upon election day before the hour for the closing of the polls the said clerk shall deliver all envelopes received by him to the election officials in the several voting precincts in which the voters named therein assert the right to vote.

Section 10 provides that "immediately after the closing of the polls, and after the ballots cast have been removed from the ballot box, the warden or his deputy in each polling place" shall verify the envelopes and applications in the manner therein prescribed, and if he finds them to be correct "he shall make public announcement of the names of the absent voters, . . . and . . . shall deposit the ballots in the ballot box." Section 11 provides that "all ballots received by mail shall be subject to challenge when and as cast," for the causes defined in said section. Section 14 provides as follows: —

All envelopes received by clerks of cities and towns after the hour fixed for the closing of the polls on the day of election shall be retained by them unopened until the time set by law for the destruction of ballots cast at the state election, at which time the envelopes shall likewise be destroyed, unopened and unexamined.

Section 18 provides that the terms "city clerk" and "registrars of voters" shall in Boston apply to the board of election commissioners.

The act leaves the question submitted in considerable doubt. Sections 9, 10 and 11 support a construction which would exclude all absent voting ballots which are not delivered to election officials at the several polling places prior to the hour fixed for the closing of the polls. The provisions of these sections cannot, as a practical matter, be complied with if the ballots of absent voters can be delivered to the

several polling places after the polls close. It is to be observed that the act makes no provision for recording the moment of receipt by the city or town clerk. The absence of such a provision would indicate that the polling place is the depository of the ballots of all voters, present or absent, and that no ballots of either present or absent voters can be cast at any other place than the polling place, and the closing of the polls is effective to prevent the receipt of ballots of present or absent voters. The provision that the warden or his deputy at each polling place shall verify the envelopes and applications *immediately* after the closing of the polls obviously could not be complied with unless the envelopes and applications were in hand at the closing of the polls, and the right to challenge ballots received by mail when and as cast, upon public announcement of the names of absent voters, would be seriously affected if the polls were open for an indefinite period to receive the ballots of absent voters. An injury to the messenger on the way to the polling place might prevent delivery of the ballots for hours after the other ballots had been counted and the returns made to the city or town clerk.

I am therefore of the opinion that the provisions of section 14 cannot operate to control the clear import of sections 9, 10 and 11. The absent voter takes the risk of delay in the mails, and, as the final depository of the ballot is the polling place, he also takes the risk of delay in delivery by the city or town clerk, or, in the case of the city of Boston, by the election commissioners, to the warden or his deputy at the polling place. It follows that the ballots of absent voters which do not arrive at the polling place in time for delivery before the polls are declared closed can neither be cast nor counted, but should be returned, to be held by the city or town clerk, or in Boston by the election commissioners, and destroyed unopened and unexamined, under the provisions of section 14.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Salaries — State Boxing Commission — State Police Officer.

The compensation received by one who is deputized by the State Boxing Commission under St. 1920, c. 619, is not "salary," within the meaning of R. L., c. 18, § 11, providing that "a person shall not at the same time receive more than one salary from the treasury of the commonwealth." R. L., c. 6, § 58, forbids payment of extra compensation to an employee or officer for special work done in regular working hours, but does not forbid extra compensation for overtime service.

Oct. 30, 1920.

Col. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You have asked my opinion upon the following case: —

St. 1920, c. 619, establishes a State Boxing Commission. Section 2 provides in part as follows: —

The chairman of the commission may deputize one or more persons to represent the commission and to be present at any match or exhibition authorized to be held as hereinafter provided, who may receive such compensation for actual service as shall be fixed by rule or regulation of the commission, together with their travelling expenses actually and necessarily incurred in the discharge of their duties.

You inquire whether, under this provision, you may deputize a member of the State Police and pay him the special compensation therein provided.

R. L., c. 18, § 11, provides: —

A person shall not at the same time receive more than one salary from the treasury of the commonwealth.

The compensation received by one who is deputized by the State Boxing Commission is not "salary," within the meaning of this provision. See *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 4; II Op. Atty.-Gen. 21. It is rather in the nature of a fee paid for special service. Payment of such extra compensation for special service to one who already receives a salary from the Commonwealth is, therefore not forbidden by this section. II Op. Atty.-Gen. 21; II Op. Atty.-Gen. 309.

R. L., c. 6, § 58, provides in part: —

Salaries payable from the treasury of the commonwealth . . . shall be in full for all services rendered to the commonwealth by the persons to whom they are paid.

This provision forbids payment of extra compensation to an employee or officer for special work done in regular working hours, but by immemorial custom does not forbid extra compensation for overtime service. II Op. Atty.-Gen. 309. It is for you to determine in each case, in the exercise of a sound discretion, whether in point of fact the State police officer, in acting as deputy for the State Boxing Commission, is simply doing special work in regular working hours, or is rendering overtime service which he ought not reasonably to be asked to perform as a part of his regular duties. I see no objection to deputizing him in either case, but his right to extra compensation must depend upon whether the service is or is not overtime service. It is, of course, plain that you should not deputize a State police officer to perform overtime service for extra compensation if another officer may be called upon to perform the same service as a part of his regular duties. That is also a question of fact which you must determine in each case in the exercise of a sound discretion.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Director of a Division of a State Department — Salary —
Member of Advisory Board of Same Department — Ad-
ditional Compensation.*

A person who has been appointed director of a division of a State department, and receives therefor a yearly compensation, may not receive any additional compensation for services rendered to the Commonwealth as a member of the advisory board of that department, unless such services as a member of the advisory board are rendered outside of working hours, or unless his duties as director are not sufficient to require his continuous service in that position.

Nov. 1, 1920.

HON. GEORGE B. WASON, *Finance Committee of the Executive Council*.

DEAR SIR: — You request my opinion as follows: —

Please give me, as a member of the finance committee of the Council, an opinion as to whether or not the paying to Leslie R. Smith of a per diem compensation of \$10 a day as a member of the advisory board of the Department of Agriculture is contrary to the provisions of the Revised Laws prohibiting the receiving of two salaries by a State official. Mr. Smith, besides being a member of the advisory board, is the Director of the Division of Reclamation and Soil Survey.

Under the provisions of Gen. St. 1919, c. 350, § 35, the Governor appointed Mr. Smith a member of the advisory board of the Department of Agriculture. Section 36 of said chapter 350 provides in part that the advisory board "shall receive ten dollars a day while in conference and their actual traveling expenses incurred in the performance of their official duties." Under the provisions of section 37 the Commissioner of Agriculture appointed Mr. Smith Director of the Division of Reclamation, Soil Survey and Fairs. His compensation has been fixed by the Commissioner, with the approval of the Governor and Council, at \$4,000 a year.

R. L., c. 18, § 11, reads as follows:—

A person shall not at the same time receive more than one salary from the treasury of the commonwealth.

One of my predecessors in office, referring to this provision of the Revised Laws, made this statement:—

The undoubted intention of that statute was to prevent a person from being employed in two positions at the same time, receiving salary from each one. It does not prevent the payment of compensation for extra services not rendered during the usual hours of employment in the position for which the person is employed. It has been the immemorial practice in the State House to permit the employment of those receiving salaries, during extra hours and for extra compensation. This, of course, would not apply to general State officers, but only to clerks, whose contract ordinarily is for services during regular office hours. II Op. Atty.-Gen. 309.

It will not be disputed that the compensation of \$4,000 a year received by Mr. Smith as Director of the Division of Reclamation, Soil Survey and Fairs is a salary which he receives from the Commonwealth, within the meaning of R. L., c. 18, § 11. It is not necessary to quote authorities in defining what is meant by the word "salary" other than to point out that it is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called "piece work" basis, and are more frequently subject to deductions for loss of time. As thus defined, Mr. Smith's

compensation on a per diem basis as a member of the advisory board of the Department of Agriculture is a wage paid him for the limited time in which he is engaged upon this special work.

A further question arises, however, which has not been considered in the opinions previously rendered, to which reference has been made, but which follows naturally from the language employed by my predecessor in that portion of the opinion which has been quoted.

By the provisions of R. L., c. 6, § 58, salaries payable from the treasury of the commonwealth "shall be in full for all services rendered to the commonwealth by the persons to whom they are paid." The clear intent of this statute would prohibit a person holding a salaried position which, by statutory enactment or because of the duties devolving upon him, required full-time service, from receiving compensation for any other services rendered during the usual hours of employment in the salaried position which he occupies.

There are, however, certain offices and commissions which do not, in law or in fact, require all the time of the incumbents in the performance of the required duties. There is no valid reason why officials and employees of whom only part-time service is required should not engage in other work, and receive compensation therefor, during their unemployed time; and, while they may not accept another salaried position from the Commonwealth, there is no prohibition on receiving other compensation for services rendered to the Commonwealth outside of the hours required in performing the duties in the salaried position.

I am therefore of opinion that, subject to the limitation that a person may not hold two salaried positions in the service of the Commonwealth, any person engaged in work which requires full-time service may receive additional compensation for additional work performed outside of the usual working hours of his employment, and a person holding a position in the service of the Commonwealth which requires only part-time service may receive additional compensation for services to the Commonwealth during the time not required in the full performance of the duties of his position.

Applying this general principle to the special subject of your inquiry, it follows that Mr. Smith may not receive any

additional compensation for services rendered to the Commonwealth as a member of the advisory board of the Department of Agriculture unless such services are rendered outside of working hours, or unless his duties as a Director of the Division of Reclamation and Soil Survey are not sufficient to require his continuous service in that position.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

*Insurance — Fire Insurance — Massachusetts Standard Policy
— Modification — “Riders” — Replacement Value.*

A fire insurance company authorized to write insurance against fire in this Commonwealth cannot attach to the Massachusetts standard form of policy, established by St. 1907, c. 576, § 60, a rider which bases the liability of the company, not upon the value of the property at the time of the fire, but upon the replacement value of the property.

Nov. 1, 1920.

HON. CLARENCE W. HOBBS, *Commissioner of Insurance*.

DEAR SIR:— You have requested my opinion upon the following question of law:—

Can a company authorized to write insurance against fire in this Commonwealth attach to the standard form of policy established by St. 1907, c. 576, § 60, a rider making the company liable for a sum in excess of the actual value of the building at the time any fire shall occur, and representing the sum required to restore the building or erect a new building, in accordance with the requirements of ordinances, statutes, building laws or orders of city authorities, of like size and character for purposes of occupancy or occupancies similar to the purposes for which the building may be occupied at the time any loss prescribed in the policy shall occur? In other words, can a company base its liability not upon the value of the property at the time of the fire, but on the replacement value of the property?

You point out that the provisions of the standard policy limit the liability of the company to the actual value of the insured property at the time any loss or damage happens, but the provisions of the standard policy may be modified by rider or endorsement written on the margin or across its face. The first clause of section 32 of chapter 576 authorizes companies to insure against loss or damage by fire, and you

state that the question would appear to be as to whether this authority is large enough to warrant the writing of insurance based upon the replacement value of the property.

Our statute relative to the use of the standard form of fire policy is St. 1907, c. 576, § 60, which reads as follows:—

No fire insurance company shall issue fire insurance policies on property in this commonwealth, other than those of the standard form herein set forth, except as follows:

.
Seventh, A company may write upon the margin or across the face of a policy, or write, or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; . . .

In the standard form of policy there is to be found this clause: "This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens."

Your Department has on file a ruling of this Department, rendered some time ago, that the standard form of policy set forth in said section 60 was not intended to be the sole permissible form of contract.

Former Attorney-General Herbert Parker, in an opinion to the Insurance Commissioner under date of Oct. 31, 1904, said:—

The Legislature has not attempted to make the provisions of the standard form compulsory upon insurer or insured, nor to make such form the sole permissible form of contract. Section 60 does not forbid the making of a special contract embodying terms inconsistent with the terms contained in the standard form; indeed, it provides for such modifications of the standard form as the parties may choose to make (cl. seventh). The apparent purpose of the Legislature was to establish an approved form of contract, upon which the insured might confidently rely without the necessity of considering special stipulations which might be obscure or of doubtful import as to the obligations or limitations of the contract. II Op. Atty.-Gen. 545.

The seventh excepting clause permits such additions to or modifications of the standard form as may be permissible on general principles of law. I Op. Atty.-Gen. 104.

The present inquiry, therefore, resolves itself into a question as to whether or not the modification of the clause that the company shall not be liable beyond the actual value of the

insured property, by substituting a replacement value for such actual value, is permissible under the general principles of our insurance law. In this connection I would call your attention to St. 1907, c. 576, § 57, which reads as follows:—

No insurance company shall knowingly issue any fire insurance policy upon property within this commonwealth for an amount which with any existing insurance thereon exceeds the fair value of the property, . . .

If buildings insured against loss by fire, and situated within this commonwealth, are totally destroyed by fire, the company shall not be liable beyond the actual value of the insured property at the time of the loss or damage; . . .

It is not, therefore, in my opinion, permissible for an insurance company writing insurance against fire in this Commonwealth to modify our standard policy by substituting the replacement value for the actual value of the property at the time the loss occurs. The cost of replacing real property has been held in some jurisdictions to furnish a fair criterion for estimating the amount of loss. *Ætna Ins. Co. v. Johnson*, 21 Am. Rep. 223; *Holter L. Co. v. Firemen's Fund Ins. Co.* 45 Pac. 207. In Richards on Insurance Law it is pointed out that this line does not give a true measure of present value of damage in the case of an old building, and cites the cases of *Scott v. Security Fire Ins. Co.*, 98 Ia. 67, and *Hilton v. Phoenix Assurance Co.*, 42 Atl. 412. Richards, "Insurance Law," p. 297.

In a recent case in this Commonwealth, where there was a total loss, our Supreme Judicial Court held that the referees were justified in refusing to take into account as elements of loss the increased cost to the plaintiff of rebuilding after the fire, due to the fact that under the building laws the new structure must be of more expensive materials. This element of loss contended for was held to have no relation to the actual value of the insured property. *Second Soc. of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 523. Considerations which might be germane to an inquiry as to the amount of damage resulting from a partial destruction of the building insured have no place where there is a total destruction by fire. *Hewins v. London Assurance Corp.*, 184 Mass. 177.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Abatement of Tax — Duty of Collector.

A city collector of taxes is bound to accept a certificate for abatement direct from the county commissioners; he is not justified in conditioning his acceptance upon similar acceptance by the local assessors.

Nov. 10, 1920.

HON. WILLIAM D. T. TREFRY, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You ask if it is within the jurisdiction of the collector of taxes of a city to accept a certificate for abatement direct from the county commissioners, regardless of the local board of assessors.

St. 1909, c. 490, pt. I, §§ 76 and 82, would seem to be so clear as to require no opinion from this Department. Section 76 provides for an appeal to the county commissioners by a party aggrieved by the refusal of assessors to abate the tax, and further provides that the said county commissioners, if the board finds the property has been overrated, shall make a reasonable abatement and an order as to costs. Section 82 sets forth that a person whose tax has been abated shall be entitled to a certificate thereof from the assessors, clerk of the commissioners or other proper officer.

In the case of *Inhabitants of Great Barrington v. County Commissioners*, 112 Mass. 218, the court held, in substance, that the findings by the county commissioners on matters of fact are conclusive. In the case of *Lowell v. County Commissioners*, 152 Mass. 372, 379, the court said: —

The final judgment of the county commissioners is conclusive upon all the world as to the valuation to be put upon the property, for the purpose of the assessment for which the value is determined. . . .

The county commissioners are substantially an appellate court, and their order of abatement supersedes any order by the lower tribunal. Hence, the collector of taxes is required to accept, and act accordingly upon, an order of abatement from said commissioners.

Very truly yours,

J. WESTON ALLEN, *Attorney-General.*

*Taxation — Domestic Business Corporation — Tax imposed in
Case of Sale of Assets.*

A corporation which sold all its assets in March, 1920, is liable, under St. 1910, c. 187, § 1, five days before such sale, to pay the taxes imposed by Gen. St. 1919, c. 355, and by St. 1920, c. 550, as amended by St. 1920, c. 600.

Nov. 23, 1920.

MR. HAROLD S. LYON, *Director, Division of Corporations, Department of Corporations and Taxation.*

DEAR SIR: — In a recent letter you state the following facts: —

A domestic business corporation sold all its assets on March 16, 1920, receiving in consideration of such sale three hundred shares of the stock of another corporation. On April 9, 1920, it filed its return as of April 1, showing its assets to be said three hundred shares of stock, and also showing its net income as reported to the Federal government for the year ending Dec. 31, 1919. Subsequent to April 1 the corporation voted to dissolve.

You state a second case, which is precisely like the preceding except that the vote to dissolve was taken prior to April 1, 1920.

The question arising upon both cases is the same, that is to say, — are these corporations liable to pay the excises provided by Gen. St. 1919, c. 355, and by St. 1920, c. 550, as amended by chapter 600 of the acts of the same year?

St. 1910, c. 187, § 1, as amended by Gen. St. 1919, c. 349, § 19, provides: —

The sale or transfer, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the corporation's business, of any part or the whole of the assets of a corporation which is subject to the provisions of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, and acts in amendment thereof and in addition thereto, and which is liable to taxation thereunder, shall be fraudulent and void as against the commonwealth, unless such corporation shall, at least five days before the sale or transfer, notify the tax commissioner of the proposed sale or transfer and of the price, terms and conditions thereof, and of the character and location of said assets. Whenever such a corporation shall make such a sale or transfer, the tax imposed by said chapter, or by acts in amendment thereof or in addition thereto, shall become due and payable at the time when the tax commissioner is so notified, or, if he is not so notified, at the time when he should have been notified.

This section seems to answer your question so far as the tax provided by Gen. St. 1919, c. 355, is concerned. Five days before each corporation's sale of its assets the excise became due; that is, on March 11, 1920.

St. 1920, c. 550, as amended, imposes a further tax of three-fourths of one per cent on the net income shown in the corporation's Federal return filed next prior to April 1, 1920, and provides, further, that the tax so imposed shall be "applicable to the net income of said corporations for the period covered by their return of income to the federal government next prior to the first day of April of the current year."

In March, 1920, therefore, when these corporations sold their assets, the income upon which their taxes were to be measured, that is, their income for the year ending Dec. 31, 1919, had accrued, and its amount had become fixed. Under the provisions of the section above quoted the tax provided by said chapter 550, like the excise provided by Gen. St. 1919, c. 355, became due on March 11, 1920.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Schoolhouse — Building occupied by Young Men's Christian Association of New Bedford — License for Operator of Moving Pictures.

That portion of premises occupied by the Young Men's Christian Association of New Bedford which is used for educational purposes is a schoolhouse, within the meaning of St. 1914, c. 791, § 17, and a special license may be granted, as provided therein, for the operation of a moving-picture machine in connection with the educational classes conducted on the premises.

Nov. 24, 1920.

MR. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You state that one of the employees of the Young Men's Christian Association at New Bedford, which holds evening classes in different subjects during the winter months, where several classes of foreign-born persons are given instruction in English and other kindred subjects, has made application for examination as a moving-picture operator, claiming such application to be under the provisions of St. 1914, c. 791, § 17.

You request my opinion as to whether this association,

under these circumstances, can be said to be a school, within the meaning of St. 1914, c. 791, § 17.

Section 1 of said chapter 791 places certain restrictions on the use of cinematographs or similar apparatus "in or upon the premises of a public building, public or private institution, schoolhouse, church, theatre, special hall, public hall, miscellaneous hall, place of assemblage, or place of public resort."

Section 17 of said chapter 791 provides as follows: —

Notwithstanding any of the provisions of this act, the chief of the district police may grant special licenses for operators of moving pictures in churches, schoolhouses, or public institutions in the cities and towns of the commonwealth, except Boston, which, in his opinion, are in safe condition for said exhibitions, and he may prescribe regulations for the proper conduct of the same. A fee of two dollars shall accompany each application for such special license.

The intention of the Legislature in permitting the granting of special licenses, under suitable regulations, for operators of moving pictures in churches, schoolhouses and public institutions, as distinguished from other places of public resort enumerated in section 1, was to favor the work or activity carried on therein rather than the moving-picture operator or the type or kind of building in which the pictures are to be shown. By the use of the term "schoolhouse" the Legislature intended not a school building, that is, a building used solely for school purposes, but any premises where instruction is given in art, sciences, language or any species of learning.

I am of the opinion that such portion of the premises of the Young Men's Christian Association of New Bedford as is used for educational purposes, as stated in your communication, is included within the meaning of the term "schoolhouse" as used in said section 17. Moving pictures shown in connection with or as part of the educational classes carried on therein form a part of the school curriculum.

I am therefore of the opinion that in so far as the applicant for an operator's license is to limit his work to the operation of a moving-picture machine in connection with the educational classes conducted on the premises, he may apply for an examination for a special license, under the provisions of said section 17.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Interstate Rendition — Proof of Flight from Justice.

A requisition for the surrender of an alleged fugitive from the justice of another State should be accompanied by evidence that the person demanded is in fact such fugitive from justice.

Nov. 26, 1920.

HIS EXCELLENCY CALVIN COOLIDGE, *Governor of the Commonwealth.*

SIR: — I acknowledge receipt of a letter dated Nov. 23, 1920, addressed to Your Excellency by Hon. Alfred Smith, Governor of the State of New York, and referred to this Department.

In his letter Governor Smith states his dissent from the opinion rendered to Your Excellency by this Department on Nov. 20, 1920, to the effect that the requisition of the Executive of the State of New York for the rendition of an alleged fugitive from justice could not lawfully be complied with. That opinion was based upon the fact that the usual affidavit containing proof of the flight from justice did not accompany the requisition.

It is unnecessary to state that this Department has given earnest and respectful consideration to the views expressed by the Governor of the State of New York. Yet, with all deference, it feels constrained to adhere to its former opinion.

The requisition was, indeed, accompanied by an indictment in due form, and by a petition, addressed by the district attorney of Columbia County to the Governor of the State of New York, in which it was stated that the accused could not be found in Columbia County and was in fact within this Commonwealth. Nevertheless, one may be indicted for and convicted of a crime for which he cannot be extradited because he was not within the demanding State at the time when said crime, or some part of it, was committed. *In re Cook*, 49 Fed. Rep. 833; *Roberts v. Reilly*, 116 U. S. 80. A case of that type is where A, in Massachusetts, shoots B, who is standing across the line in New Hampshire. Another is where A, in Massachusetts, makes false representations to B, who, subsequently returning to New York, parts with his money or his goods as a result of the false and fraudulent representations made by A. It may be added that proof that the demanded person cannot be found in the demanding State at the time of the requisition is not proof that he was in the demanding State when the alleged crime was committed.

It is not sufficient to say that Your Excellency is always justified in requiring proof of the flight from justice; an alleged fugitive arrested on an extradition warrant issued without such proof would be discharged upon his petition for *habeas corpus*. *Ex parte Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80; *McNichols v. Pease*, 207 U. S. 100.

A statute of this Commonwealth provides that a demand for rendition "shall be accompanied by sworn evidence that the person charged is a fugitive from justice . . ." R. L., c. 217, § 11. Whether this statute be mandatory, or directory only, this Department does not now deem it necessary to express an opinion, for it appears from the cases above cited that *some* proof, whether sworn or otherwise, must be presented to the Executive upon whom a demand is made before that demand may lawfully be complied with.

The letter of the Governor of the State of New York states that "the Lieutenant Governor and Acting Governor of this State, after a careful examination of the papers, certified to you that this man was a fugitive from the State of New York. . . ." As the requisition has been returned to the Governor of the State of New York, it has not been possible to examine it again, but a recent and similar requisition has been examined, in which the Lieutenant-Governor and Acting Governor of the State of New York certified that the accompanying papers were "authentic and duly authenticated in accordance with the laws of this State," and that the offence charged was "crime under the laws of this State," but which, with reference to the flight from justice, certified only that it had "*been represented to me*" that the demanded person was a fugitive from the justice of the State of New York. This recital does not appear to be a certification, made upon the knowledge and responsibility of the Executive of the State of New York, that the person demanded was a fugitive from justice. In practice, a recital of the type last quoted, rather than a certification by the demanding Executive that the demanded person is a fugitive from justice, is usual; the flight from justice is usually shown by an accompanying affidavit made by some person having knowledge of the whereabouts of the alleged fugitive at the time the alleged crime was committed.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Tuition of State Minor Wards — Payment by Town — Reimbursement of Town by Commonwealth.

It is unconstitutional for a town to appropriate money for the tuition of children in a private institution.

A town may not be reimbursed by the Commonwealth for money expended by the town for tuition of State minor wards in a private institution.

Dec. 1, 1920.

Mr. ROBERT W. KELSO, *Commissioner of Public Welfare.*

DEAR SIR: — You have requested my opinion on the following question: —

Can the Commonwealth legally reimburse the town of Monson for the cost of tuition for two State minor wards placed therein by this Department?

It appears that these two wards have been in attendance at Monson Academy, a private institution located in the town of Monson; that the town of Monson, by specific exemption granted by the State Board of Education under St. 1914, c. 556, was relieved of the necessity of maintaining a public high school; and that the town of Monson has been using the Monson Academy in lieu of a public high school.

I assume that the request for reimbursement is made under Gen. St. 1919, c. 291, which provides, in clause (b), for payment by the Commonwealth to cities and towns for tuition in the public schools of children placed in such cities and towns by the State Board of Charity; and further provides, in clause (d): —

A child placed by the state board of charity or trustees of the Massachusetts training schools, or trustees for children of the city of Boston in a town which does not maintain a public high school offering four years of instruction, may attend the high school of another city or town under the same conditions that apply to a child whose parent or guardian resides in such town, except that the tuition of such child shall be paid as provided in paragraph (b) of this section, and that the commonwealth or the city of Boston, as the case may be, may reimburse the town in which the child is placed for the whole cost of his transportation.

Obviously, this statute does not require or authorize payment by the Commonwealth for the tuition of such a child in any other school than a public school.

To determine the question whether the Commonwealth can lawfully make such payment it is not necessary to resort to inference or reasoning from general principles. The State Constitution itself contains the answer. Mass. Const. Amend. XLVI, § 2, provides, in part, as follows:—

All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; . . .

Section 3 of said article XLVI is as follows:—

Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

Assuming, as I do from your statement, that Monson Academy is not conducted under the order and superintendence of the town authorities, this amendment makes payment by the town of Monson for tuition in Monson Academy illegal, and forbids expenditure out of the treasury of the Commonwealth for the purpose of repaying money so spent. I am confirmed in this opinion by the exception contained in section 3, which expressly authorizes payment of compensation by the Commonwealth, or any political subdivision thereof, to privately controlled hospitals, infirmaries or institutions for the deaf, dumb or blind, for care or support actually rendered or furnished. Private schools are not included in this exception, which purports to state what payments may be made to institutions for the benefit of public charges. With respect to education the Commonwealth makes no distinction between such persons and others. Equal opportunity is given to all for education at the public expense in the public schools, but not elsewhere.

This question has been considered and a like conclusion reached in former opinions of this Department.

In an opinion given by Hon. Hosea M. Knowlton in 1896

(I Op. Atty.-Gen. 321) he held that in the light of Mass. Const. Amend. XVIII (containing the identical language quoted above from Mass. Const. Amend. XLVI, § 2), an act of the Legislature (St. 1895, c. 94, § 1) was unconstitutional, which provided as follows: —

Any town in which a high school is not maintained, but in which an academy of equal or higher grade is maintained, may grant and vote money to pay the tuition of children residing in such town and attending such academy: *provided*, such academy is approved for that purpose by the state board of education.

In the course of his opinion he said: —

The purpose of the constitutional amendment was to prohibit the use of public funds for the education of the children of the Commonwealth in any institution, however conducted, and whether sectarian or not, the control of which is not in the municipal authorities. If the expenditure be for the purpose of the education of the children of the town, it is within the spirit of the prohibition of the amendment.

. . . If this statute is allowed to stand, the policy of paying the tuition of school children may be further extended, and it might even be possible to provide for the education of all the children of a town in sectarian schools and at the public expense; a proposition which the people of the Commonwealth would be slow, I apprehend, to accept, and against which, indeed, the amendment in question may be said to have been principally directed.

In another opinion on a similar question (II Op. Atty.-Gen. 98) he said: —

If the town sees fit to expend money for tuition which it is not compelled to, it cannot ask reimbursement therefor from the treasury of the Commonwealth.

My predecessor, Hon. Henry C. Attwill, in an opinion dated May 18, 1918 (Attorney-General's Report, 1918, p. 39), following the reasoning in the opinions above quoted from, stated: —

It seems to me plain, therefore, that under the later amendment (art. XLVI) cities and towns will have no constitutional right to appropriate funds for the maintenance of an academy not under the order and superintendence of the school committee, or to pay the tuition of pupils resident in such town and attending such an academy.

As I have stated, I am of the opinion that the Commonwealth may not reimburse the town of Monson for the cost of tuition of the two State minor wards placed therein by your Department.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Taxation — Corporation — Franchise Tax.

The value of real estate purchased by a corporation after April 1, under an agreement made prior to April 1, providing that the corporation should pay the local taxes assessed thereon to the vendor, is not deductible in determining the amount of the franchise tax to be paid by the corporation.

DEC. 6, 1920.

HON. WILLIAM D. T. TREFRY, *Commissioner of Corporations and Taxation*.

DEAR SIR:— You have assessed a franchise tax for the year 1920 upon the New England Trust Company, having estimated the fair cash value of all the shares of stock constituting its capital on the first day of April, 1920, and having deducted therefrom the value of certain real estate owned by the corporation in the city of Boston and subject to local taxation, all as provided in St. 1909, c. 490, pt. III, § 41. The trust company made application to you to deduct also the value of certain other real estate, purchased by it within the year 1920. You declined to make the deduction, and the trust company appealed to the Board of Appeal. The Board of Appeal desires my opinion as to whether the value of this real estate should have been deducted from the value of the corporate franchise.

The trust company is clearly taxable under the provisions of the said statute (pt. III, §§ 40, 41 and 43). These sections require the Tax Commissioner to estimate the fair cash value of all the shares constituting the capital stock of a corporation subject to the act on the preceding first day of April (which value shall be taken as the true value of its corporate franchise), and to deduct therefrom, in the cases covered by section 41, clause fourth, which include trust companies, the "value as found by the tax commissioner of their works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation wherever situated."

The material facts relating to the purchase of the property by the New England Trust Company, as set forth in your letter and by counsel for the company, are as follows: —

The trust company entered into an agreement prior to April 1, 1920, for the purchase of the property, agreeing to take over the property on or before April 15, 1920, and to pay the local taxes assessed thereon. The deed was signed on April 2, 1920. Delivery of the deed and payment of the purchase price were made on April 8, 1920, after the passage on April 7, 1920, of an act (St. 1920, c. 265) authorizing the New England Trust Company to hold additional real estate, and the trust company took possession on that date. This property was taxed locally to the vendor. The trust company paid the tax pursuant to its agreement.

On this statement of facts the person who was the owner of the property on April 1 was clearly the vendor, who was, therefore, primarily liable for the full amount of the tax. Consequently, the assessment of the tax to the vendor by the city was not only proper, but was the only method of assessment possible under the law. *Hill v. Bacon*, 110 Mass. 387; *Richardson v. Boston*, 148 Mass. 508; *Webber Lumber Co. v. Shaw*, 189 Mass. 366.

The phrase appearing in clause fourth of section 41 — “the value as found by the tax commissioner of their works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation wherever situated” — clearly means taxation to the corporation as owner. The purpose of the deductions provided by section 41 is to avoid the double taxation which would result from the levying of a tax on the whole amount of the fair cash value of the stock of a corporation owning as a part of its assets property in the Commonwealth for which it was liable to be taxed.

In *Firemen's Insurance Co. v. Commonwealth*, 137 Mass. 80, 81, 83, the court said, with reference to a similar provision for deductions in an earlier statute, that the object of the Legislature was “to prevent double taxation in fact, if not in form,” and hence “to provide that the corporation should not be taxed, under the form of an excise upon its franchise, for *any property on which it pays a local tax.*” The court accordingly held that the Tax Commissioner should deduct the value of mortgages on real estate held by the corporation for the local taxes on which it was liable. See

also *Tremont & Suffolk Mills v. Lowell*, 178 Mass. 469; *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156, 160; II Op. Atty.-Gen. 556.

The fact that the corporation agreed in this instance to pay the taxes for 1920 makes no difference, either technically or as a matter of fairness. That agreement merely affected the consideration to be paid. The fact remains that the property was not the corporation's "real estate . . . subject to local taxation," within the meaning of the said statute, and that the tax on this property was assessed to the vendor and not to the trust company, both because on April 1, 1920, the real estate afterwards purchased was not a part of the trust company's assets, affecting the value of its shares on which the amount of the franchise tax was computed, and because that real estate was taxed to the vendor and not to the trust company. It is not a case of double taxation.

I am therefore of opinion that the deduction asked for should not be made.

Very truly yours,

J. WESTON ALEX, *Attorney-General*.

Boxing Exhibitions — Licenses not required from Municipalities.

The State Boxing Commission has exclusive authority to grant licenses for boxing exhibitions.

DEC. 10, 1920.

Col. ALFRED F. FOOTE, *Commissioner of Public Safety*.

DEAR SIR: — You inquire if a license to hold a boxing exhibition is required from the municipal authorities under the provisions of R. L., c. 102, § 172, and in Boston under St. 1908, c. 494, as amended by Spec. St. 1915, c. 348, in addition to the license required under the boxing law (St. 1920, c. 619).

The first-mentioned law reads in part as follows: —

The mayor and aldermen of a city or the selectmen of a town may . . . grant a license for theatrical exhibitions, public shows, public amusements and exhibitions of every description . . . upon such terms and conditions as they deem reasonable. . . .

The law with reference to Boston is not essentially different on the question at issue.

The boxing law, when accepted by a city or town, provides that no boxing exhibition for a prize or fund at which admission is charged shall take place except in pursuance of a license granted by the Commission. Provision is made in the law that after payment of expenses incurred under the act the money received shall be distributed to the cities and towns in proportion to the amounts received (§§ 3, 19).

There is no provision for the repeal or limitation of the laws above referred to which regulate the licensing of amusements by municipal authorities, because these laws are still operative to control the granting of licenses for all other public amusements.

A city or town may accept the provisions of the boxing law if certain preliminary steps are taken and a majority of the votes cast on the proposition are in favor. Thus the law is permissive, not mandatory, and there is no attempt to limit the application of the principle of home rule by the act. As the boxing law makes ample provision for the licensing of these exhibitions, and as the municipalities receive a portion of the money derived from the license, it would appear that the former statutes were not intended to apply to boxing exhibitions. The receipts under the new act are in lieu of the license fees which, in the case of other public amusements, are paid directly to the municipality.

There is no implied intent in St. 1920, c. 619, to extend the operation of the early statutes to boxing exhibitions. Such an intent must clearly appear.

It may be observed in this connection that without an acceptance of the boxing law no licenses can be granted by any one for boxing exhibitions. The municipalities lose no authority by the act, for the local officials have no present right to license boxing exhibitions unless it can fairly be said that, while no authority can grant a license unless the law is accepted by a city or town, if accepted the law thereupon requires two licenses by two different boards before such exhibition can be held. I am of the opinion that such is not the true construction of the law, and that the State Boxing Commission alone has the right to grant licenses of this character.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Fire Prevention — License to store Gasoline — Decision on Application — “Order” — Right of Appeal to Commissioner of Public Safety.

The action of the State Fire Marshal in confirming the decision of a board of street commissioners, relative to an application for a license to store gasoline, falls within the definition of the word “order,” as that word is used in Gen. St. 1919, c. 350, § 109, which gives a right of appeal to the Commissioner of Public Safety to any person affected by an order of the Department or of a division or office thereof.

St. 1913, c. 577, as amended by St. 1914, c. 119, regulates the erection and maintenance of garages in the city of Boston. The provisions are distinct and separate matters from those in St. 1914, c. 795, § 3, and are not repealed thereby.

DEC. 14, 1920.

Col. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR:— You desire my opinion on the following question:—

A corporation applied to the board of street commissioners of Boston for a license to keep, store and sell gasoline in South Boston. After a public hearing before the board of street commissioners the applicant was given leave to withdraw. Acting under the authority of Gen. St. 1916, c. 138, the applicant then placed the matter before the city council of Boston, who approved the action of the street commissioners in rejecting the application. The mayor then disapproved the action of the city council in approving the action of the street commissioners. The applicant then appealed to the State Fire Marshal from the decision of the street commissioners, and the State Fire Marshal approved the decision of the street commissioners. The applicant now appeals to you, as Commissioner of Public Safety, for a hearing relative to the decision of the State Fire Marshal affirming the denial of the board of street commissioners to issue said license.

Your specific questions are as follows:—

1. Was the action of the State Fire Marshal in confirming the decision of the board of street commissioners an “order,” within the meaning of Gen. St. 1919, c. 350, § 109?

2. Did the board of street commissioners of the city of Boston act solely under delegated authority, or does it have rights of its own

granted to it by St. 1913, c. 577, and St. 1914, c. 119, or are these two acts repealed by St. 1914, c. 795, § 3?

By the enactment of St. 1914, c. 795, the powers relative to the prevention of fires in the metropolitan district were transferred to and vested in the Fire Prevention Commissioner, and, as bearing particularly on the present question, all powers to license persons or to grant permits to keep, store or sell crude petroleum, or any of its products, were by section 3 of said chapter 795, transferred to and vested in said Commissioner. By section 4 of that chapter power was given the Fire Prevention Commissioner to delegate the granting and issuing of any licenses or permits authorized by this act to the head of the fire department or to any other designated officer in any city or town in the metropolitan district.

Proceeding under this section, Fire Prevention Commissioner O'Keefe, on Sept. 10, 1915, delegated the power to license the manufacture, keeping and sale of gasoline to the mayor and board of street commissioners of the city of Boston, and on the same date delegated the power to issue permits for the keeping, storage, use and sale of gasoline within the city of Boston to the fire commissioner of Boston.

Section 18 of said chapter 795 provides that the Fire Prevention Commissioner "shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons, acting or purporting to act under authority of the commissioner, done or made or purporting to be done or made under the provisions of this act, and shall make all necessary and proper orders thereupon, and any person aggrieved by any such action of the head of a fire department or other person shall have an absolute right of appeal to the commissioner."

Gen. St. 1919, c. 350, § 104, provides that the director (State Fire Marshal) in charge of the Fire Prevention Division shall perform the duties of the Fire Prevention Commissioner for the Metropolitan District. Section 109 of said chapter 350 provides: —

Any person affected by an order of the department or of a division or office thereof, may, within such time as the commissioner may fix, which shall not be less than ten days after notice of such order, appeal to the commissioner, who shall thereupon grant a hearing, and after such hearing may amend, suspend or revoke such order. . . .

Taking up your first question as to whether or not the action of your State Fire Marshal in confirming the decision of the board of street commissioners in this case is to be construed as an order, within the meaning of said section 109, it is my opinion that the decision of the State Fire Marshal falls within the language of an order. This decision is arrived at in the light of the provisions of section 18 of the fire prevention act, which gave an absolute right of appeal to the Fire Prevention Commissioner, not only from orders of the Department instructing certain things to be done or not to be done relative to fire protection, but also to acts and decisions of persons acting or purporting to act under the authority of the Fire Prevention Commissioner.

As to your second question, as to whether or not the board of street commissioners is acting solely under the authority delegated to it by the Fire Prevention Commissioner on Sept. 10, 1915, or is also acting under authority of St. 1913, c. 577, as amended by St. 1914, c. 119, and further, whether these two acts were repealed by section 3 of the metropolitan district fire prevention law, I would state that this question was covered in an opinion rendered by former Attorney-General Henry C. Attwill to Fire Prevention Commissioner O'Keefe, under date of June 28, 1915. That opinion read in part as follows: —

The statute of 1913, as amended by St. 1914, c. 119, deals with the construction of garages. It makes it impossible for a garage to be erected within the limits of the city of Boston without the approval of the street commissioner. In him is lodged the authority of determining whether in a given location it is expedient for a garage to be constructed. He may lawfully refuse to license the erection of such a building in a residential, business or other section if he believes it to be detrimental to the interests of the community. This is true, even though the garage be intended for the use of electric motor cars or for the storage of other automobiles containing no gasoline. The act of 1913 is a distinctly home rule measure, and in its enforcement the State officials have no concern. If such a garage is constructed and the occupant seeks to store gasoline therein, either in bulk or in the tank of a car, then, and not until then, is the Fire Prevention Commissioner given power to act.

It is clear that St. 1913, c. 577, as amended by St. 1914, c. 119, was not repealed by section 3 of the fire prevention law. The duties and powers of the board of street commissioners, proceeding under St. 1913, c. 577, as amended,

and the duties and powers delegated to it under the fire prevention law, are two separate and distinct matters. So far as this particular question at hand is concerned, we are only dealing with the action of the street commissioners as bearing upon their decision as to whether or not they would grant to the corporation in question a license to keep, store and sell gasoline at a point within the city of Boston. The power to make this decision has been delegated to them by your Department, and the applicant in turn has appealed to the State Fire Marshal, who has made a decision confirming the action of the street commissioners. But this decision is to be construed as an order, as pointed out above, and, accordingly, the applicant, under the provisions of Gen. St. 1919, c. 350, § 109, now has the right to appeal to you for a hearing.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

Civil Service — State Aid and Pensions — Officers — Approval of Governor and Council.

The words "offices hereby established," as used in Gen. St. 1918, c. 164, § 2, exempting incumbents from the civil service laws, are used to designate the three clerks and eight agents whose appointment was provided for in section 1 of that act.

The offices of the clerks and agents whose appointment was provided for by Gen. St. 1919, c. 190, § 1, are not the offices created by Gen. St. 1918, c. 164, § 1, and are subject to the civil service laws.

The clerks and agents who, under Gen. St. 1919, c. 190, § 1, may be appointed with the approval of the Governor and Council, are not officers whose appointment is subject to confirmation by the Executive Council, within the meaning of R. L., c. 19, § 9, exempting such officers from classification under the Civil Service Rules.

DEC. 20, 1920.

MR. PAYSON DANA, *Commissioner of Civil Service*.

DEAR SIR: — You ask me to review the opinions rendered by former Attorney-General Henry C. Attwill, dated July 11, 1919, and Aug. 13, 1919, relating to positions in the office of the Commissioner of State Aid and Pensions. These opinions involved a consideration of St. 1914, c. 587, § 1, Gen. St. 1918, c. 164, and Gen. St. 1919, c. 190.

St. 1914, c. 587, is entitled "An Act relative to State and military aid and to the burial of indigent soldiers and sailors."

Section 1 states the powers, duties and salaries of the Commissioner of State Aid and Pensions and of the deputy commissioner. It then continues: —

The commissioner may appoint a chief clerk at a salary of fifteen hundred dollars a year, one agent at a salary of fourteen hundred dollars a year, one agent at a salary of thirteen hundred dollars a year, one agent at a salary of eleven hundred dollars a year, one special agent at a salary of nine hundred dollars a year, one clerk at a salary of twelve hundred dollars a year, one clerk at a salary of one thousand dollars a year, and two clerks each at a salary of not more than one thousand dollars a year.

Gen. St. 1918, c. 164, § 1, amends section 1 of the former act as follows: —

Section one of chapter five hundred and eighty-seven of the acts of nineteen hundred and fourteen is hereby amended . . . by striking out all after the word “year”, in the thirty-seventh line, and substituting the words: — three clerks at salaries of not more than twelve hundred dollars a year each; and eight agents to be employed during the present war and for one year following its termination, at salaries of thirteen hundred dollars a year each, — so as to read as follows: — . . .

The remaining portion of said section consists of a restatement of section 1 of the former act in its amended form. The words following the word “year,” in the thirty-seventh line of the former act, which were stricken out by this section were as follows: “and two clerks each at a salary of not more than one thousand dollars a year.”

Section 2 of Gen. St. 1918, c. 164, is as follows: —

The offices hereby established shall not be subject to the civil service laws.

Gen. St. 1919, c. 190, § 1, provides: —

Chapter five hundred and eighty-seven of the acts of nineteen hundred and fourteen, as amended by chapter one hundred and sixty-four of the General Acts of nineteen hundred and eighteen, is hereby further amended by striking out section one and substituting the following: — . . .

The remaining portion of said section 1 is the substituted section 1 of the former statute (St. 1914, c. 587). It states

the powers, duties and salaries of the Commissioner of State Aid and Pensions and of the deputy commissioner. It then proceeds as follows: —

The commissioner may, with the approval of the governor and council, appoint a chief clerk and not exceeding five other clerks and stenographers, and twelve agents. The salaries of said chief clerk, clerks, stenographers and agents shall be fixed in accordance with the provisions of chapter two hundred and twenty-eight of the General Acts of nineteen hundred and eighteen and within the limit of the amount annually appropriated by the general court.

Gen. St. 1918, c. 228, referred to in said substituted section 1, is entitled “An Act to provide for the classification of certain positions in the Commonwealth and to regulate promotion therein.” It provides for the classification of “all appointive officers and positions in the government of the commonwealth, except those in the judicial and legislative branches,” regulates the fixing of salaries attached to such offices and positions and contains, in section 5, the following provision: —

Nothing contained herein shall be construed as placing employees of the commonwealth outside the civil service laws, rules and regulations.

The opinion of former Attorney-General Attwill was in substance that section 2 of Gen. St. 1918, c. 164, exempted from the civil service laws all the offices established by section 1 of St. 1914, c. 587, as amended, and that said section 2, not having been repealed, had the same effect upon the offices established by the 1919 statute.

The first question to be considered is as to the meaning of the words “the offices hereby established,” in section 2. There are several possible interpretations of these words: —

1. The word “offices” may be used in the restricted sense as opposed to “employments.” In this sense “offices” would probably include the positions of the commissioner and deputy commissioner, but not of the clerks and agents. *Brown v. Russell*, 166 Mass. 14, 26; *Attorney-General v. Tillinghast*, 203 Mass. 539, 543; I Op. Atty.-Gen. 72; III Op. Atty.-Gen. 158. But in the Civil Service Rules the word “office” is used in a different sense, in contradistinction to positions involving mere manual labor; and in statutes

relating or referring to those rules the words are used in that broader sense. *Gardner v. Lowell*, 221 Mass. 150, 152; III Op. Atty.-Gen. 158, 160. Note St. 1911, c. 624; Gen. St. 1919, c. 350, § 11. I am of opinion that the word "offices" in Gen. St. 1918, c. 164, § 2, is used in the broader sense, which includes the positions of clerks and agents.

2. The words "offices hereby established" may refer to all the offices mentioned in section 1 of St. 1914, c. 587, as amended by section 1 of Gen. St. 1918, c. 164. This was the opinion of former Attorney-General Attwill. But the act of 1918 merely amended the act of 1914, so far as it related to offices thereby established, by striking out the provision for the appointment of two clerks and substituting one for the appointment of three clerks and eight agents.

3. It is therefore my opinion that no offices were established by the act of 1918 beyond those of three clerks and eight agents.

The effect of the act of 1919 must now be considered. By this act section 1 of St. 1914, c. 587, as amended by Gen. St. 1918, c. 164, § 1, is entirely stricken out and a new section substituted. In this new section the offices of the three clerks and eight agents at certain definite salaries, not subject to the civil service laws, disappear, and in place of the offices of those clerks and agents and of other clerks and agents at certain definite salaries, referred to in the earlier statute and subject to the civil service laws, provision is made for the appointment of a "chief clerk and not exceeding five other clerks and stenographers, and twelve agents," whose salaries are to be fixed in accordance with the provisions of Gen. St. 1918, c. 228.

I am of opinion that the offices thus referred to in the act of 1919 are none of them offices established by the act of 1918, and that therefore the provisions of section 2 of Gen. St. 1918, c. 164, have no application whatever. I am confirmed in this opinion by the provision that the salaries of the chief clerk, clerks, stenographers and agents shall be fixed in accordance with the provisions of Gen. St. 1918, c. 228, which contains the provision, above quoted, that "nothing contained herein shall be construed as placing employees of the commonwealth outside the civil service laws."

It remains to consider the effect of the words "with the approval of the governor and council," limiting the Com-

missioner's power of appointment, as provided in the act of 1919.

Under R. L., c. 19, § 9, "officers . . . whose appointment is subject to confirmation by the executive council" are exempt from classification under the Civil Service Rules. The word "officers" is there used in the restricted sense to designate persons holding public office as opposed to public employment. *Attorney-General v. Tillinghast*, 203 Mass. 539; III Op. Atty.-Gen. 158. In my judgment, the clerks and agents who, under Gen. St. 1919, c. 190, may be appointed by the Commissioner with the approval of the Governor and Council are not such officers, and therefore R. L., c. 19, § 9, is inapplicable. This construction is supported by the further provision in said section 9 expressly exempting "heads of principal departments of the commonwealth," justifying the inference that subordinates in those departments were not exempted, and by Gen. St. 1919, c. 350, § 11, which, recognizing that subordinates in departments may be "appointed to office by the governor with the advice and consent of the council," provides that "the heads of divisions of departments established by or under authority of this act shall be exempt from the civil service law and the rules and regulations made thereunder," justifying a like inference. It is therefore not necessary to consider whether the words "with the approval of the governor and council" in the act of 1919 have the same significance as the words "subject to confirmation by the executive council" in said section 9. See in this connection III Op. Atty.-Gen. 129.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

*Bank — Fraudulent or Misleading Advertising — Power of
Commissioner of Banks.*

If the Commissioner of Banks finds as a fact that a bank is soliciting deposits by means of advertising which is either false and fraudulent or intentionally misleading, he can find that such bank is conducting its business in an unsafe and unauthorized manner, within the meaning of St. 1910, c. 399, § 2 (G. L., c. 167, § 22), even though the bank has not as yet impaired its capital or brought itself into an unsafe condition to transact its business.

The Attorney-General advises upon questions of law; he cannot decide questions of fact, or control the exercise of a discretion vested by law in another officer.

DEC. 23, 1920.

MR. JOSEPH C. ALLEN, *Commissioner of Banks.*

DEAR SIR: — You have requested an opinion upon certain facts, which I understand from your oral statements are in substance as follows: —

Successive advertisements have been published by a “bank,” as defined in St. 1910, c. 399, § 1. You have evidence tending to show that statements in certain of these advertisements are not in accordance with the facts, and other statements are of a character likely to mislead the public as to material matters connected with the business of the bank.

You inquire whether, if the series of advertisements contain false and misleading statements, you would be warranted in finding that said bank is conducting its business “in an unsafe or unauthorized manner,” within the meaning of St. 1910, c. 399, § 2, even though it does not appear that its capital is impaired or “that such bank is in an unsound or unsafe condition to transact the business for which it is organized,” within the meaning of said section 2.

Before advising you in answer to your inquiry, it will clarify the situation to determine the duty of your Department and this Department in regard to it. St. 1910, c. 399, § 2, confers broad powers upon the Commissioner. He must determine the truth of the evidence before him. When the truth of the evidence has been determined, there arises the question whether it is sufficient in law to warrant a finding that the conditions required by section 2 are satisfied, — *e.g.*, that the corporation is conducting its business “in an unsafe or unauthorized manner.” If that issue is decided in the affirmative, the Commissioner must then determine, in the exercise of a sound discretion, what action he shall take in the premises. This Department can neither decide questions of fact nor assume to determine what action the Commissioner shall take in the exercise of the discretion conferred upon him. The statute imposes both those duties upon the Commissioner. This Department can only advise you upon the question of law, namely, whether certain evidence, if true, is sufficient to warrant a finding that the conditions required by section 2 have been satisfied.

Banking is founded upon credit. Credit rests upon mutual trust between bank and customer. Mutual trust between

bank and customer cannot exist if either ceases to believe in the honesty, sound judgment and solvency of the other. Neither can long believe in the honesty or sound judgment of the other if that other ceases to be honest and to judge soundly. These two qualities enter into and mainly determine the "moral hazard" of every business transaction. No one will question that honesty and sound judgment on the part of the bank are essentials of "safe" banking, both in actual experience and under the statute. Solvency is not a substitute for either, and cannot long endure without both.

It is essential to every bank to secure and to retain a sufficient number of depositors and a sufficient amount of deposits. An ordinary deposit constitutes a debt due from the bank to the depositor. Advertisements designed to secure new deposits are intended to persuade individuals to become creditors of the bank. Proof that an individual has obtained a loan by means of a representation of fact known by him to be false would warrant a conviction for larceny. *R. L.*, c. 208, § 26; *Commonwealth v. Lincoln*, 11 Allen, 233; *Commonwealth v. Coe*, 115 Mass. 481; *Commonwealth v. Howe*, 132 Mass. 250. It is no defence that the defendant intended to repay (*Commonwealth v. Coe*, 115 Mass. 481; *Spaulding v. Knight*, 116 Mass. 148), promised to repay and did in fact repay. *Commonwealth v. Coe*, 115 Mass. 481. It cannot be that a bank is "authorized" to do what, if done by an individual, would constitute larceny. Moreover, public disclosure of such facts could be found to be destructive of the bank's credit. I am therefore of opinion that, if you find that a bank is attempting to procure deposits by means of false and fraudulent advertising, you would be warranted in finding that such bank "is conducting its business in an unsafe and unauthorized manner," within the meaning of said section 2.

Similar considerations govern in the case of advertising which, while not actually false and fraudulent, is intentionally misleading. It differs only in degree from advertising which is false and fraudulent. The public does not draw fine distinctions. It is misled in either case, and will probably not stop to analyze the precise means by which the false impression is created. Banking experience has demonstrated how easily a run may be started and how quickly a panic spreads. A bank which intentionally misleads its customers is doing

business upon a charged mine. A casual word or even an unconsidered act may cause an explosion at any moment, and if public confidence is once destroyed, it is difficult if not impossible to regain it. I therefore advise you that, if you find that advertisements published for the purpose of securing deposits are intentionally misleading, even though not actually false and fraudulent, you would be warranted in finding that the bank is conducting its business in an "unsafe" manner, within the meaning of section 2.

I am confirmed in these conclusions by the language of St. 1910, c. 399, § 2, which reads as follows:—

Whenever it shall appear to the bank commissioner that any bank under his supervision has violated its charter or any law of the commonwealth, or is conducting its business in an unsafe or unauthorized manner, or that its capital is impaired, or if it shall refuse to submit its books, papers and concerns to the inspection of said commissioner or of his duly authorized agents, or if any officer of such bank shall refuse to be examined upon oath by the commissioner or his deputies touching its concerns, or if it shall suspend payment of its obligations, or if from an examination or from a report provided for by law the bank commissioner shall have reason to conclude that such bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business, the bank commissioner may take possession forthwith of the property and business of such bank and may retain possession thereof until the bank shall resume business or until its affairs shall finally be liquidated as herein provided.

It will be observed that said section 2 enumerates several conditions, any one of which, if found by the Commissioner to exist, authorizes him to take possession forthwith of the property and business of the bank. The conditions expressly enumerated include the case where the bank is conducting its business in an unsafe or unauthorized manner, as well as the case where its capital is impaired and the case where such bank is in an unsound or unsafe condition to transact the business for which it is organized. A construction of the statute which would leave the Commissioner without power to act until the bank had either impaired its capital or was already in an unsound or unsafe condition to transact the business for which it is organized would render meaningless the authority to act if the bank was conducting its business in an unsafe or unauthorized manner. The latter provision

was clearly intended to give power to prevent the mischief from being done, and therefore cannot be so construed as to tie the hands of the Commissioner until after the mischief has already occurred.

I am therefore of opinion that if the Commissioner finds that a bank is conducting its business in an unsafe or unauthorized manner he has power to act, even though the bank has not as yet impaired its capital or brought itself into an unsound or unsafe condition to transact the business for which it is organized.

As already pointed out, it is neither the function nor the duty of this Department to control the exercise of any discretion vested in the Commissioner by law. But, in view of the broad powers vested in you by said section 2, a suggestion may be made as to the exercise of this discretion. Section 2 authorizes the Commissioner to take possession of the property and business of a bank if it shall "appear" to him that one of the conditions enumerated in said section has been satisfied.

This power is given for the protection of the public rather than to punish any wrongful or improper conduct on the part of the bank. For this reason the action taken should be examined from the public viewpoint, and should not be more drastic than proper protection of the public demands. Each case must, of course, be determined upon its own facts, but it may well be that if a bank is still in sound condition, in spite of conduct found by you to be improper, and the situation does not require that the bank be closed in order to protect the public from the consequences of such conduct, a warning that continuance of such conduct may result in the exercise of the power conferred by section 2 may be all that the exercise of a sound discretion would require. It may be suggested that such warning, if it can be given with due regard for the interest of the public, would place the Commissioner in a stronger position if he later determined that more drastic action was necessary. But, as I have already pointed out, the decision of this question rests in your discretion, — a discretion which it is not within the province of this office to direct or control.

Very truly yours,

J. WESTON ALLEN, *Attorney-General*.

Prisoners — Female Life Prisoner — Power to bind out to Domestic Service.

A female prisoner who is serving a life sentence cannot be bound out to domestic service under the provisions of G. L., c. 127, §§ 85 and 86.

DEC. 29, 1920.

HON. CHANNING H. COX, *Lieutenant Governor of the Commonwealth.*

DEAR SIR: — You have orally inquired whether a female prisoner, sentenced to death for murder, whose sentence was commuted to imprisonment for life in the Reformatory for Women at Sherborn, may be bound out to domestic service under R. L., c. 225, §§ 69 and 70, which, on Jan. 1, 1921, is replaced by G. L., c. 127, §§ 85 and 86. Section 85 provides as follows: —

The commissioner may, with the consent of a woman serving a sentence in the reformatory for women or in a jail or house of correction, and with the consent of the county commissioners if she is in a jail or house of correction, contract to have her employed in domestic service for such term, not exceeding her term of imprisonment, and upon such conditions, as he considers proper with reference to her welfare and reformation. If in his opinion her conduct at any time during the term of the contract is not good, he may order her to return to the prison from which she was taken.

Section 86 in substance provides that if the woman leaves her place of service, or, if ordered to return to prison, neglects or refuses so to do, she shall be deemed to have escaped from prison and may be arrested, convicted and sentenced to an additional term of not less than three months nor more than one year.

After careful consideration, I am of opinion that female life prisoners are excluded by implication from these provisions. A life sentence differs in kind from a sentence for a definite term. It is imposed only for the most abhorrent crimes, and because the safety of the public in such cases requires that the prisoner be permanently confined. It is the only sentence which the prisoner never completes — death overtakes him in the expiation of his crime. To such a sentence the provisions of law which authorize the parole board to grant permits to be at liberty do not apply. See G. L., c. 127, §§ 128-149. To bind a female prisoner out to

domestic service is in effect to permit her to be at liberty upon condition that she remain in that service. It is in effect a part of the parole system, and must rest upon the same considerations of public policy. I cannot believe that the Legislature intended that female life prisoners should be eligible to be bound out to service, when at the same time it denied parole to all life prisoners.

I am confirmed in this conclusion by the provision for punishment in case of an escape. A life sentence cannot be increased. There can be no additional term. To the life prisoner the provision for an additional sentence in case of escape is a nullity. I therefore advise you that neither R. L., c. 225, §§ 69 and 70, nor G. L., c. 127, §§ 85 and 86, are applicable to a female prisoner who is serving a life sentence.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

*Board of Registration in Medicine — Quasi-judicial Body —
Expense of securing Testimony for Hearings under Gen.
St. 1917, c. 218 — Conduct of Hearings.*

The Board of Registration in Medicine, acting in its quasi-judicial capacity, is not authorized to expend money in the hire or employment of detectives for the procuring of evidence to formulate or support charges to be heard by it.

The functions of investigating, prosecuting and hearing charges should not be vested in the same person or persons.

DEC. 29, 1920.

Board of Registration in Medicine.

GENTLEMEN:— You have requested my opinion on the following question:—

May the Board of Registration in Medicine incur the expense of securing testimony to be used at a hearing held under the provisions of Gen. St. 1917, c. 218?

Gen. St. 1917, c. 218, § 1, provides, in substance, that the Board of Registration in Medicine, and certain other boards, may, by majority vote, suspend or revoke any certificate, registration, license or authority issued by the board "if it appears to the board" that the holder of such certificate is

insane or is guilty of certain offences described in the act. Said section further provides: —

The different boards may make such rules and regulations as they deem proper for the filing of charges and the conduct of hearings.

Section 2 authorizes said boards to summon witnesses in the manner therein defined, and further provides: —

Any person against whom charges are filed may appear at the hearing thereof with witnesses and be heard by counsel.

Section 3 provides: —

The said boards shall not defer action upon any charge before them until the conviction of the person accused, nor shall the pendency of any charge before any of the said boards act as a continuance or ground for delay in a criminal action.

Section 4 provides: —

The supreme judicial court may, upon petition of a person whose certificate, registration, license or authority has been suspended, revoked or cancelled, enter a decree revising or reversing the decision of the board, if it should appear that the decision was clearly wrong; but prior to the entry of such decree, no order shall be made or entered by the court to stay or supersede any suspension, revocation or cancellation of any such certificate, registration, license or authority.

In my opinion, the boards named in this statute act in a quasi-judicial capacity. Each board has authority to revoke or suspend any certificate issued by it if it appears to the board that the holder of such certificate is either insane or has been guilty of any of the offences defined in section 1. But this authority is to be exercised in an orderly and judicial manner, though not with the technical precision of a trial at law. Unless the accused has left the Commonwealth or cannot be found, he is entitled, under section 2, to a hearing, at which he may appear with witnesses and be heard by counsel. While the Board may adopt rules for the filing of charges and the conduct of hearings and may summon witnesses, I find nothing in the statute which imposes upon the Board a duty to prepare and press the charge which it is to hear and decide. To do so would combine the conflicting functions of prosecutor and judge. I am therefore of opinion that the

statute does not authorize the Board to expend money for the services of detectives in order to formulate charges to be brought before it, or to support charges to be heard by it.

I may add that R. L., c. 76, § 6, which requires the Board to investigate certain classes of complaints and to "report the same to the proper prosecuting officers," would seem, by implication, to exclude complaints upon which the Board is itself to pass in its quasi-judicial capacity. A different construction of the act might raise serious constitutional questions. See Bill of Rights, art. XXIX.

I am not unmindful that the public interest may suffer if the prosecution of charges before the Board is left to the public spirit and initiative of private complainants who may, and in many instances would, be reluctant to press charges. But this consideration cannot justify a procedure which might deprive the person charged with an offence of the right to have the charge heard and determined by an impartial tribunal. Efficient protection of the public would seem to require additional legislation which would require some officer of experience and special training to investigate possible offences, and, if investigation gave reasonable cause to believe that an offence had been committed, to prosecute the same before the Board. I see no reason why this duty might not be imposed upon the secretary or any other official of the Board, provided that in investigating complaints made to the Board such official is not subject to the control or direction of the Board. Such legislation would, in my opinion, preserve the impartial character of the quasi-judicial body which is to hear and determine the charges, and, at the same time, give effect to what may well have been the intention of the Legislature in establishing this and similar registration boards, namely, to provide for efficient investigation as well as the prosecution of complaints before the Board, in order to protect the public.

Yours very truly,

J. WESTON ALLEN, *Attorney-General*.

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GRADE CROSSINGS.

The following petitions for the abolition of grade crossings are pending: —

Berkshire County.

North Adams, Mayor and Aldermen of, petitioners. Petition for abolition of State Street and Furnace Street crossings. Edmund K. Turner, David F. Slade and William G. McKechnie appointed commissioners. Commissioners' report filed. Pending.

Pittsfield, Mayor and Aldermen of, petitioners. Petition for abolition of Merrill crossing in Pittsfield. Thomas W. Kennefick, Frederick L. Green and Edmund K. Turner appointed commissioners. Pending.

Stockbridge. Berkshire Railroad, petitioner. Petition for abolition of Glendale station crossing. Pending.

West Stockbridge, Selectmen of, petitioners. Petition for abolition of grade crossing at Albany Street. James D. Colt, Charles W. Bosworth and James L. Tighe appointed commissioners. Pending.

Bristol County.

Taunton, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Danforth and other streets in Taunton. Thomas M. Babson, George F. Swain and Edwin U. Curtis appointed commissioners. Charles H. Beckwith appointed commissioner in place of Thomas M. Babson, deceased. Commissioners' report filed. James A. Stiles appointed auditor. Pending.

Essex County.

Gloucester. Directors of Boston & Maine Railroad, petitioners. Petition for abolition of grade crossing between Washington Street and tracks of Boston & Maine Railroad. Pending.

Lawrence, Mayor and Aldermen of, petitioners. Petition for abolition of crossing at Merrimac and other streets in Lawrence.. Robert O. Harris, Edmund K. Turner and Henry V. Cunningham appointed commissioners. Pending.

Lawrence, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossing at Parker Street. James D. Colt, Henry V. Cunningham and Henry C. Mulligan appointed commissioners. Pending.

Lynn, Mayor and Aldermen of, petitioners. Petition for abolition of Summer Street and other crossings on Saugus branch of Boston & Maine Railroad and Market Street and other crossings on main line. George W. Wiggin, Edgar R. Champlin and Edmund K. Turner appointed commissioners. Commissioners' report filed. Edward A. McLaughlin appointed auditor. Auditor's eighth report filed. Pending.

Lynn, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Pleasant and Shepard streets, Gas Wharf Road and Commercial Street, on the Boston, Revere Beach & Lynn Railroad. Pending.

Salem. Directors of Boston & Maine Railroad, petitioners. Petition for the abolition of grade crossings at Bridge, Washington, Mill, North, Flint and Grove streets in Salem. Patrick H. Cooney, George F. Swain and William A. Dana appointed commissioners. Pending.

Salem, Mayor and Aldermen of, petitioners. Petition for abolition of Lafayette Street crossing in Salem. Pending.

Franklin County.

Erving, Selectmen of, petitioners. Petition for abolition of grade crossing on the road leading from Millers Falls to Northfield. Samuel D. Conant, Arthur H. Beers and Charles C. Dyer appointed commissioners. Commissioners' report filed. Pending.

Greenfield, Selectmen of, petitioners. Petition for abolition of grade crossing at Silver Street. Stephen S. Taft, Henry P. Field and Thomas J. O'Connor appointed commissioners. Commissioners' report filed and recommitted. Stephen S. Taft, Jr., appointed commissioner in place of Stephen S. Taft resigned. Commissioners' second report filed. Pending.

Hampden County.

Palmer, Selectmen of, petitioners. Petition for abolition of Burley's crossing in Palmer. Pending.

Hampshire County.

Amherst, Selectmen of, petitioners. Petition for abolition of grade crossings at Whitney, High and Main streets. Railroad Commissioners appointed commissioners. Pending.

Middlesex County.

Acton, Selectmen of, petitioners. Petition for abolition of Great Road crossing in Acton. Benj. W. Wells, George D. Burrage and William B. Sullivan appointed commissioners. Commissioners' report filed. Fred Joy appointed auditor. Pending.

Arlington, Selectmen of, petitioners. Petition for abolition of grade crossings at Mill and Water streets. Pending.

Belmont, Selectmen of, petitioners. Petition for abolition of crossings at Waverley station. Thomas W. Proctor, Patrick H. Cooney and Desmond FitzGerald appointed commissioners. Pending.

Chelmsford, Selectmen of, petitioners. Petition for abolition of grade crossing at Middlesex Street. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Marble Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Concord Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Waverly Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Bishop Street crossing. Pending.

- Framingham, Selectmen of, petitioners. Petition for the abolition of Hollis and Waushakum streets crossings. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Claflin Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for abolition of grade crossings at Willis Crossing. Pending.

Lowell, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Middlesex and Fletcher streets and Western Avenue. George F. Swain, Patrick H. Cooney and Nelson P. Brown appointed commissioners. Commissioners' report filed. Pending.

- Marlborough, Mayor and Aldermen of, petitioners. Petition for abolition of Hudson Street crossing in Marlborough. Walter Adams, Charles A. Allen and Alpheus Sanford appointed commissioners. Commissioners' report filed. Pending.
- Newton, Mayor and Aldermen of, petitioners. Petition for the abolition of Concord Street and Pine Grove Avenue crossings in Newton. George W. Wiggin, T. C. Mendenhall and Edmund K. Turner appointed commissioners. Pending.
- Somerville, Mayor and Aldermen of, petitioners. Petition for abolition of Park Street, Dane Street, and Medford Street crossings in Somerville. George W. Wiggin, George F. Swain and James D. Colt appointed commissioners. Commissioners' report filed. James D. Colt appointed auditor in place of Patrick H. Cooney deceased. Auditor's thirteenth report filed. Pending.
- Wakefield, Selectmen of, petitioners. Petition for abolition of Hanson Street crossing in Wakefield. Pending.
- Waltham, Mayor and Aldermen of, petitioners. Petition for abolition of South Street crossing in Waltham. Geo. F. Swain, — — — and Geo. A. Sanderson appointed commissioners. Pending.
- Waltham, Mayor and Aldermen of, petitioners. Petition for abolition of Moody Street, Main Street, Elm Street, River Street, Pine Street, Newton Street and Calvary Street crossings in Waltham. Arthur Lord, Patrick H. Cooney and George F. Swain appointed commissioners. Pending.
- Watertown, Selectmen of, petitioners. Petition for abolition of grade crossings at Cottage, Arlington, School, Irving and other streets in Watertown. Pending.
- Wayland, Selectmen of, petitioners. Petition for abolition of grade crossing at State Road. George F. Swain, Harvey N. Shepard and Arthur W. DeGoosh appointed commissioners. Pending.
- Weston, Selectmen of, petitioners. Petition for abolition of grade crossings at Central Avenue, Conant Road, Church and Viles streets. P. H. Cooney, Louis A. Frothingham and Andrew M. Lovis appointed commissioners. Pending.

Winchester, Selectmen of, petitioners. Petition for the abolition of crossing at Winchester station square. George W. Wiggin, George F. Swain and Arthur Lord appointed commissioners. Commissioners' report filed and recommitted. Pending.

Norfolk County.

Braintree, Selectmen of, petitioners. Petition for the abolition of the Pearl Street crossing at South Braintree. Patrick H. Cooney, Frank N. Nay and George F. Swain appointed commissioners. Pending.

Braintree. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at School, Elm, River and Union streets in Braintree. John L. Bates, Winfield S. Slocum and Arthur H. Wellman appointed commissioners. Commissioners' report filed. Pending.

Dedham, Selectmen of, petitioners. Petition for the abolition of Eastern Avenue and Dwight Street crossings in Dedham. Alpheus Sanford, Charles Mills and J. Henry Reed appointed commissioners. Commissioners' report filed. Fred E. Jones appointed auditor. Pending.

Dover, Selectmen of, petitioners. Petition for abolition of grade crossing at Springdale Avenue and Dedham and Haven streets. Public Service Commission appointed commissioners. Pending.

Needham, Selectmen of, petitioners. Petition for abolition of Charles River Street crossing in Needham. Pending.

Quincy. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Saville and Water streets crossings in Quincy. John L. Bates, Winfield S. Slocum and Arthur H. Wellman appointed commissioners. Commissioners' report filed and recommitted. Joseph B. Lyons appointed commissioner in place of Winfield S. Slocum, deceased. Commissioners' second report filed. Henry A. Wyman appointed auditor. Pending.

Westwood. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Green Lodge Street crossing in Westwood. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners' report filed. Recommited. Pending.

Plymouth County.

Rockland, Selectmen of, petitioners. Petition for abolition of grade crossings at Union and other streets in Rockland. Pending.

Suffolk County.

Boston. New York, New Haven & Hartford Railroad Company, petitioner. Petition for abolition of grade crossing at West First Street. William B. Thompson, Philip Nichols and H. Heustis Newton appointed commissioners. Commissioners' report filed. George W. Bishop appointed auditor. Auditor's first report filed. Pending.

Revere, Selectmen of, petitioners. Petition for abolition of Winthrop Avenue crossing in Revere of the Boston, Revere Beach & Lynn Railroad. Pending.

Worcester County.

Auburn. Boston & Albany Railroad Company, petitioner. Petition for abolition of Cemetery Road, a private way. The Public Service Commission appointed commissioners. Pending.

Clinton, Selectmen of, petitioners. Petition for abolition of Sterling, Water, Main, High and Woodlawn streets crossings. George W. Wiggin, William E. McClintock and James A. Stiles appointed commissioners. Commissioners' report filed. David F. Slade appointed auditor. Frederic B. Greenhalge appointed auditor in place of David F. Slade deceased. Auditor's thirteenth report filed. Pending.

Harvard. Boston & Maine Railroad, petitioner. Petition for abolition of a grade crossing near Harvard station. Pending.

Hubbardston, Selectmen of, petitioners. Petition for abolition of Depot Road crossing in Hubbardston. Pending.

Leominster, Selectmen of, petitioners. Petition for abolition of Water, Summer, Mechanic and Main streets crossings. George W. Wiggin, George F. Swain and Charles D. Barnes appointed commissioners. Commissioners' report filed. Recommitted. Pending.

- Southborough, Selectmen of, petitioners. Petition for abolition of crossing on road from Southborough to Framingham. A. W. DeGoosh, Louis A. Frothingham and Eugene C. Hultman appointed commissioners. Commissioners' report filed and recommitted. Pending.
- Southborough, Selectmen of, petitioners. Petition for abolition of Main Street crossing at Fayville in Southborough. Pending.
- Southbridge, Selectmen of, petitioners. Petition for abolition of grade crossings at Foster, Central and Hook streets. George F. Swain, P. H. Cooney and William F. Garcelon appointed commissioners. Commissioners' report filed. Pending.
- Webster, Selectmen of, petitioners. Petition for abolition of grade crossing at Main Street. Pending.
- West Boylston. Boston & Maine Railroad Company, petitioners. Petition for abolition of Prescott Street crossing. Pending.
- Worcester, Mayor and Aldermen of, petitioners. Petition for abolition of crossings at Exchange, Central and Thomas and other streets. Arthur Lord, George F. Swain and Fred Joy appointed commissioners. Pending.
- Worcester, Mayor and Aldermen of, petitioners. Petition for abolition of Grafton Street crossing and eight other crossings, including alterations of Union Station. James R. Dunbar, James H. Flint and George F. Swain appointed commissioners. Commissioners' report filed. James A. Stiles appointed auditor. Auditor's seventy-third report filed. Pending.

RULES OF PRACTICE

IN INTERSTATE RENDITION.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney: —

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(b) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(*h*) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(*i*) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.



